

IN THE U.S. DISTRICT COURT.  
FOR THE DISTRICT OF MONTANA  
BILLINGS DIVISION  
CAUSE NO. CV-07-166-BLG-CSO

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TIMOTHY McCULLOUGH	:	
	:	
Plaintiff	:	<b>COURT TRANSCRIPT</b>
	:	
vs.	:	Volume I
	:	
JOHNSON, RODENBURG & LAUINGER:	:	
	:	
Defendant	:	

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April 14, 2009

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R E P O R T E D B Y:

VIRGINIA LEYENDECKER, Certified Shorthand  
Reporter, (NJ License No. 1701) and Notary Public, on  
the above date, commencing at 8:30 a.m., at the  
James F. Battin United States Courthouse, 316 North  
26th Street, Billings, Montana.

BEFORE: Hon. Carolyn S. Ostby

VK LEYENDECKER, LLC  
20 Medicine Crow Road  
Columbus, Mt. 59019 - (406) 322-5061

1       A P P E A R A N C E S:

2               HEENAN LAW FIRM  
3               BY:   JOHN HEENAN, ESQUIRE  
4               For the Plaintiff

5               BOHYER, SIMPSON & TRANEL, P.C.  
6               BY:   FRED SIMPSON, JR., ESQUIRE  
7               and JOHN BOHYER, ESQUIRE  
8               For the Defendant

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(The following discussion took place in chambers:)

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THE COURT: The record will reflect it's about 8:39, and we are in chambers with counsel. I just had a couple of things and then wanted to address any last questions that counsel had before we begin.

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First, I will give each party the preliminary instructions that I intend to read after we have a jury seated. And so I don't think we will be here very long this morning. So you will have a chance to look at them. If you have any objections to them, let me know. We will take a break after we get our jury and so let me know then and we can make a record on any objections.

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With respect to witnesses, does the defendant intend to call Dr. David Yelvington? It's on the may call list and, as I was looking at it, I saw an objection that it is an undisclosed witness, and I wonder if there was an issue about that.

24

25

MR. SIMPSON: It will depend in part, Your Honor, on the proof put on by the

1 plaintiff and how Mr. McCullough testifies with  
2 respect to his past medical history.

3 THE COURT: What would be the  
4 content generally of Dr. Yelvington?

5 MR. SIMPSON: Dr. Yelvington  
6 examined the plaintiff in a psychiatric interview  
7 setting. I believe it was in 1993. Dr.  
8 Yelvington's record of that interview was  
9 produced by the plaintiff in discovery in this  
10 case. It was one of the records we provided and  
11 was relied upon by Dr. McElhinney in his IME  
12 assessment of Mr. McCullough. So the content of  
13 his testimony would be as contained in the record  
14 that was produced by the plaintiff.

15 THE COURT: Okay. With respect  
16 to plaintiff's exhibit, I believe it's 106. It's  
17 the big exhibit that's the list of cases.

18 MR. HEENAN: Yes, Your Honor.

19 THE COURT: I gave additional  
20 thought and research to the question of including  
21 the 2008 cases. I think it went from January '07  
22 to '08. I'm going to allow you to use the entire  
23 exhibit. I apologize if you spent an awful lot  
24 of time, but I wanted to take a look at that, lay  
25 a foundation for it. I'm not going to admit it

1 right now, but I wanted to let you know that you  
2 can offer the whole thing, if you wish.

3 MR. HEENAN: Thank you, Your  
4 Honor.

5 MR. BOHYER: We renew our  
6 objection on the basis we did at the pretrial  
7 conference.

8 THE COURT: Thank you. And order  
9 of witnesses for today is what?

10 MR. HEENAN: I anticipate calling  
11 Charles Dendy by video. That's less than a  
12 20-minute video; Mike Eakin, live; CACV employee  
13 Dunker, by video; again, I think it's 20 minutes  
14 on the nose. Kerri Henan live, should be a short  
15 witness. And I guess, depending on when we have  
16 our jury picked, I'm going to see if we can't get  
17 Dr. Veraldi in today as well. Andy Patten is in  
18 Butte for the Yellowstone Club stuff. So he will  
19 be here tomorrow morning.

20 THE COURT: I do have Mr. Eakin's  
21 disclosure, and I want to again caution both  
22 parties that undisclosed opinions won't be  
23 allowed. So if there's an issue, we will have to  
24 look and see where it was disclosed.

25 I believe that covered everything

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1       that I had on my short list. Does the plaintiff  
2       have anything to raise at this time?

3                       MR. HEENAN: Briefly, Your Honor.  
4       In opening statement, I intend to use a Power  
5       Point to explain the debt-buyer industry and  
6       Johnson Rodenburg's role in the industry. I  
7       could have it printed out to show Your Honor, but  
8       I wanted to alert you to it.

9                       THE COURT: Have you showed it to  
10      defense counsel?

11                      MR. HEENAN: I haven't, but I  
12      will.

13                      THE COURT: Show it to them  
14      first. If there is any objection, let me know.

15                      MR. HEENAN: Do you want me to  
16      grab it?

17                      MR. SIMPSON: Is this an  
18      appropriate time to raise an objection?

19                      THE COURT: Yes.

20                      MR. SIMPSON: The part we object  
21      to is essentially the bottom three tiers.

22                      THE COURT: Starting with  
23      judgement for 9,000?

24                      MR. SIMPSON: Correct.

25                      MR. HEENAN: There are two

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1 different exhibits. One is in general terms the  
2 way Johnson Rodenburg conducts their practice,  
3 and then the second is, after I introduce the  
4 Complaint or show the jury the Complaint, I want  
5 to tick through --

6 THE COURT: The underlying  
7 Complaint?

8 MR. HEENAN: -- the underlying  
9 state court action, the fact they sued him for  
10 \$3800, including interest, 5500, \$500 in fees,  
11 attempting to collect \$9800 judgement so they  
12 could collect that judgement.

13 THE COURT: Let's make sure we  
14 have our record clear. The plaintiff has brought  
15 and given to the Court and defense counsel a  
16 one-page sheet that is in essence kind of a flow  
17 chart that begins at the top credit card account  
18 \$3,800 balance. Part of it is cut off. IRS tax?

19 MR. HEENAN: IRS tax deduction.

20 THE COURT: Okay. So the  
21 plaintiff's intent is to do what now with this?  
22 Could you walk us through what your wish is with  
23 respect to using this in opening?

24 MR. HEENAN: Sure. I intend to  
25 explain Johnson Rodenburg's business practice,

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1       which is to use the court system to collect  
2       debts.  They collect purchased debts.  So I  
3       intend to explain to the jury where it is these  
4       lawsuits that they're filing come from.  They  
5       come from credit card companies which take an IRS  
6       tax deduction from the amount of the delinquent  
7       debt, sell that debt to debt buyers.  The debt  
8       buyers in turn provide the spreadsheet  
9       information -- name, address, amount claimed,  
10      interest rate, date of last payment -- to Johnson  
11      Rodenburg for collection.

Johnson Rodenburg, with that information, filed lawsuits against these people. Johnson Rodenburg gets judgements against these people and, armed with the judgement, Johnson Rodenburg is able to use the court system to collect debts. And the way they use the court system is to sweep bank accounts, garnish wages and get a lien on real property.

20 THE COURT: What is the  
21 defendant's objection?

22 MR. SIMPSON: We have many  
23 objections. The first objection is with respect  
24 to the block or the top that references an IRS  
25 tax deduction. There hasn't been any witness nor

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1       any exhibit offered which proves that that in  
2       fact occurs. I would also --

3                       THE COURT: Whose deduction is it  
4       in any case?

5                       MR. HEENAN: It's the credit card  
6       company's deduction.

7                       THE COURT: What relevance does  
8       that have to the case?

9                       MR. HEENAN: It's hugely relevant  
10       because what is going to go lurking in the jury's  
11       mind is, well, don't all the people that Johnson  
12       Rodenburg sues owe the money?

13                      THE COURT: Who's going to  
14       testify?

15                      MR. HEENAN: Mike Eakin will  
16       explain the debt-buyer industry.

17                      THE COURT: We talked about this  
18       earlier. We aren't trying the debt-buyer  
19       industry. We are trying one law firm that filed  
20       a claim against your client.

21                      MR. HEENAN: Absolutely.

22                      THE COURT: I am going to caution  
23       you. I don't want anything said in opening  
24       unless there is competent evidence that is going  
25       to come in on it. I don't remember seeing

1 anything in Mr. Eakin's disclosure about tax  
2 deductions for debt buyers or for credit card  
3 companies. Now, I might be wrong, but I don't  
4 remember seeing anything about that. Was there  
5 something in there?

6 MR. HEENAN: I don't think Mike  
7 specifically addressed tax deductions.

8 THE COURT: Then he won't testify  
9 about it.

10 MR. HEENAN: Okay.

11 THE COURT: You can ask him what  
12 you want. I'm just telling you that, as I said  
13 before, experts are going to testify as to what  
14 was disclosed. If he has relevant knowledge  
15 about this case as a fact witness, he can testify  
16 about that.

17 But it doesn't appear to me, from  
18 what you've said, that tax deductions for credit  
19 card companies fall into that category. So if he  
20 didn't disclose an expert opinion about that,  
21 then he can't testify about it.

22 MR. HEENAN: So should I remove  
23 this IRS tax deduction?

24 THE COURT: I would advise you to  
25 do that. What else?

1 MR. HEENAN: I will.

2 MR. SIMPSON: Your Honor, the  
3 bottom three rows of the flow chart.

4 THE COURT: Starting with what  
5 line?

6 MR. SIMPSON: The line that says  
7 judgement for balance plus interest, slash, fees,  
8 and I guess the other copy says judgement for  
9 \$9,800.

10 As the Court is aware, there was  
11 no judgement entered against Mr. McCullough in  
12 the underlying case. The underlying case was  
13 dismissed with prejudice by stipulation of the  
14 parties before, in fact, there had been any trial  
15 and before there had been any motion for summary  
16 judgement filed. There is no proof in this case  
17 that there was ever a judgement entered against  
18 Mr. McCullough, that there's a sweep of his bank  
19 act, a garnishment of his wages, a lien ON his  
20 home or any collection by my client against Mr.  
21 McCullough.

22 So these bottom three rows are  
23 completely irrelevant and likely to confuse and  
24 mislead the jury.

25 It's not been disclosed that

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1       either Kerri Henan or Ken Lucero, the other two  
2       fact witnesses that have been identified by the  
3       plaintiff, had any of these things occur to them  
4       either. So these are irrelevant and not  
5       supported by the proof.

6                   THE COURT:   What will be the  
7       proof on this?

8                   MR. HEENAN:   The proof will be in  
9       Johnson Rodenburg's own notes it says, Tim  
10      McCullough owns his own home, need to sue. I'm  
11      certainly not going to say there was a judgement.  
12      What I'm going to say, this is where they got cut  
13      off because Mr. McCullough hired a lawyer. But  
14      this was their intent.

15                   It is highly relevant because in  
16      a malice case like this, I need to be able,  
17      through circumstantial evidence, put on what the  
18      company's business practice is and what the  
19      intent was when they sue Mr. McCullough.

20                   THE COURT:   What will be the  
21      proof at trial with respect to garnishing of  
22      wages, sweeping bank accounts and collecting 500  
23      percent --

24                   MR. HEENAN:   That is how they use  
25      the court system, to collect debt.

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1 THE COURT: Who will testify to  
2 that? I want to know what the evidence will be.

3 MR. HEENAN: Johnson Rodenburg's  
4 own lawyers are going to testify that that's how  
5 they use the court system to collect debt.

6 THE COURT: Okay. Sounds to me  
7 like there is proof that will come in with  
8 respect to that issue. So is there any --

9 MR. BOHYER: I want to raise an  
10 additional objection to that in terms of it being  
11 more prejudicial than probative.

12 THE COURT: This isn't evidence.  
13 This is an opening statement as to -- let's talk  
14 one at a time -- as to what the plaintiff intends  
15 to prove.

16 MR. BOHYER: My concern is I've  
17 heard from plaintiff's counsel they don't intend  
18 to try the debt-collection industry, if you will.  
19 I appreciate Your Honor's repeated statements to  
20 that effect.

21 But what's going to be offered  
22 from the outset here is these are how debt  
23 collection law firms operate. There is nothing  
24 prohibited by law, of course, on proper proof, of  
25 a law firm representing a client on a

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1 debt-collection claim pursuing that to judgement  
2 and using the writs of execution and the like  
3 which are provided by law to collect a debt.  
4 That's the problem with this.

5 And so, despite the Court's  
6 assurances, I have serious concerns that we are  
7 not going to be able to catch each and every tick  
8 that comes up with an indictment on our client as  
9 essentially, quote, unquote, the debt-collection  
10 industry. That's why I think it's imperative  
11 that we winnow this down to the facts of this  
12 case. And that exhibit, even with the Court's  
13 and the prior objections made, in my views, leads  
14 us down that road.

15 THE COURT: Well, we will have to  
16 deal with the proof as it comes in. And counsel  
17 will have to make their objections. But I'm  
18 satisfied from what the plaintiff has represented  
19 that plaintiff does intend to offer proof that,  
20 from what I can tell, would be admissible proof  
21 on these issues. I appreciate dealing with this  
22 in advance.

23 MR. HEENAN: I do too. Thank  
24 you, Your Honor.

25 THE COURT: Anything else the

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1 plaintiff wishes to raise?

2 MR. HEENAN: I also intend to  
3 show the jury, in opening statement, Your Honor's  
4 rulings and explain what those rulings were so I  
5 can tell them, so why are we here?

6 THE COURT: No. Those rulings  
7 are not in evidence.

8 MR. HEENAN: Okay.

9 THE COURT: You can't show them  
10 something that is not in evidence.

11 MR. HEENAN: Well, can I tell  
12 them what Your Honor's rulings were?

13 THE COURT: Yes. But I don't  
14 want you using that as evidence.

15 MR. HEENAN: But I can quote from  
16 Your Honor's order, at least briefly. The  
17 concern I have is one of the issues the jury  
18 needs to determine is what the statutory damages  
19 are in light of your FDCPA liability ruling.  
20 They need to know the context of what it is you  
21 said.

22 THE COURT: Yes. You can say  
23 what the ruling was, but I don't want you going  
24 further than that. Is that clear enough?

25 MR. HEENAN: Well, what I intend

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1 to do is say, like with the attorneys' fees, read  
2 the jury your analysis and conclusion and say,  
3 that's what the judge ruled.

4 MR. BOHYER: We object  
5 strenuously, for a couple of reasons. One, there  
6 may be some indication by the Court's rulings  
7 that that is a fact that the Court has concluded  
8 via the Court's analysis on a summary judgement  
9 ruling. So I think that's improper.

10 If there's a statement to the  
11 jury that the Court has already ruled that the  
12 defendant filed this case past the statute of  
13 limitations or that the defendant violated the  
14 Fair Trade Practices Act by maintaining the case  
15 after the statute of limitations, I think that's  
16 fair game. Because that's what your ruling is.  
17 Your factual analysis within the case is not the  
18 Court's ruling. It's the predicate for the  
19 ruling.

20 THE COURT: I think that's  
21 correct. I don't think that it's appropriate  
22 because it's not in evidence and won't be  
23 admitted into evidence, the text of those orders.  
24 That is already determined. And you can tell the  
25 jury what was determined, but this jury doesn't

1       need to know everything that led to that. That's  
2       not going to be presented to them.

3                       MR. HEENAN: I agree with that.  
4       I just mean, in terms of, I mean, if all we can  
5       say is, well, the judge found there were four  
6       violations, the jury will be thinking, well,  
7       what --

8                       THE COURT: You can say what the  
9       four were.

10                      MR. HEENAN: That's all I wanted.

11                      THE COURT: That's it. But not  
12       the analysis that led to that because it's not  
13       relevant to what they need to determine.

14                      MR. HEENAN: Understood, Your  
15       Honor.

16                      THE COURT: Anything else?

17                      MR. HEENAN: I guess now would  
18       maybe be the time to address it. Ken Lucero  
19       filed a counterclaim against Johnson Rodenburg in  
20       the Butte state court action. There's a  
21       different insurance adjustor, different attorney  
22       handling the case.

23                      Mr. Lucero settled his case last  
24       week and entered into a mutual confidentiality  
25       agreement with Johnson Rodenburg. I took that

1 lawyer at face value that he wanted to get it  
2 done. We agreed it didn't have anything to do  
3 with this case. But as being maybe a little  
4 overly cautious, I'm not going to ask him  
5 anything about the lawsuit, certainly nothing  
6 about a settlement, but I don't want to have this  
7 trap set where Johnson Rodenburg settled so that  
8 they can try and explain to the jury, through Mr.  
9 Lucero, what an appropriate settlement in a case  
10 like this is.

11 MR. SIMPSON: In the first place,  
12 we are not the ones calling Mr. Lucero. I think,  
13 if Mr. Lucero settled his case, that's fair game.  
14 We have of course objected to him offering any  
15 testimony in this matter in the first place  
16 because we don't believe his situation is  
17 relevant to the proof in this case. They are a  
18 different situation.

19 And if he is now going to testify  
20 and the facts have changed and he settled the  
21 case, I think the jury needs to know that.

22 THE COURT: I think we already  
23 covered this. And this is my understanding of  
24 it. The only thing that is relevant here with  
25 respect to Mr. Lucero is what happened to him in

1       his lawsuit is not relevant. And I think we  
2       already discussed at the final pretrial  
3       conference not getting into his lawsuit. We are  
4       trying Mr. McCullough's lawsuit, not Mr. Lucero  
5       or Ms. Henan's lawsuit.

6                       So if the plaintiff, as Mr.  
7       Heenan just said, doesn't intend to ask about Mr.  
8       Lucero's lawsuit, then anything about the  
9       settlement would be outside the scope of direct  
10      examination anyway and not, to use your words,  
11      fair game.

12                     MR. SIMPSON: I believe, under  
13      the Rules of Evidence, the bias or prejudice of a  
14      witness is always relevant in cross-examination.  
15      And with Ms. Henan and Mr. Lucero, the fact that  
16      they filed counterclaims or claims against my  
17      client for violation of the Fair Trade Practices  
18      Act brings into question their motive to at best  
19      shade the facts in their favor or in favor of Mr.  
20      McCullough, who they may view themselves. So I  
21      think restricting us from mentioning the fact  
22      that they sued our client unduly restricts our  
23      ability to cross-examine.

24                     THE COURT: The fact it's been  
25      resolved kind of eliminates that, doesn't it?

1                   MR. SIMPSON: I don't know what  
2     the terms of the settlement were, so I don't  
3     know.

4                   THE COURT: Well, I think that it  
5     would be very confusing and only marginally, if  
6     at all, relevant to get into the facts of another  
7     lawsuit. So we will just have to take it a  
8     question at a time.

9                   MR. BOHYER: I think you're  
10    right.

11                  THE COURT: I wanted to give you  
12    my thought that, as a general approach, what  
13    happened to these people if their dealings with  
14    JRL is relevant. What happened in their lawsuits  
15    is not.

16                  Now, perhaps, as Mr. Simpson  
17    suggests, there is something about possible bias  
18    and prejudice. We will have to see how that  
19    goes. We are not going to go a long way down  
20    that road because I think it's confusing and the  
21    jury will get impatient because all of a sudden  
22    we are arguing about someone else's lawsuit.  
23    That's not why we are here, and I don't think  
24    it's fair to either party.

25                  Okay. Anything else?

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1 MR. HEENAN: That's it.

2 THE COURT: Defense?

3 MR. SIMPSON: Couple things.

4 First, we still have unresolved the question of  
5 whether the plaintiff will be allowed to suggest  
6 or ask the jury to award specific sums for  
7 emotional distress or punitive damage.

8 THE COURT: He may.

9 MR. SIMPSON: The other issue is,  
10 I understand the Court's ruling we are not  
11 entitled to cross-examine Mr. McCullough with  
12 respect to his settlement with CACV, but are we  
13 allowed to cross-examine the fact that he settled  
14 that case?

15 THE COURT: What relevance?

16 MR. SIMPSON: I think the jury  
17 will wonder why CACV isn't here. They are  
18 clearly in the center of this.

19 THE COURT: I don't think that's  
20 so clear. I mean, your client has been sued.  
21 They sued him. There are other people involved.  
22 There is the credit card company. There is the  
23 fact that he was sued before by a different law  
24 firm. There are a lot of different players here.

25 I want this case tried on the

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1 facts that are relevant to the claims at issue.  
2 And getting sidetracked on settlements of other  
3 claims against other parties, I think, again, is  
4 not within the scope of relevance or, under Rule  
5 403, is going to confuse the issues and mislead  
6 the jury. Again, we will take it a question at a  
7 time.

8 But in the hopes of being  
9 helpful, I want counsel to know that that's my  
10 general approach here. I don't want to have a  
11 lot of skirmishes about what happened to other  
12 cases. Because it just doesn't matter here.

13 Anything else?

14 MR. SIMPSON: No, Your Honor.

15 THE COURT: On your prior  
16 question about the motion about the position that  
17 the defendant took with respect to limiting  
18 argument of counsel, of course the plaintiff, and  
19 while neither party is permitted to use surprise  
20 evidence, any testimony that would come in or any  
21 evidence offered about the specifics of damages  
22 that were not disclosed won't be allowed. But  
23 with respect to an attorney in closing making a  
24 suggestion to the jury as to an amount that he  
25 believes the evidence supports, I'm not going to

1 preclude that.

2 MR. SIMPSON: Thank you.

3 THE COURT: Anything else? Let's  
4 get started.

5 (Brief recess.)

6 THE COURT: Please call the case.

7 THE COURT CLERK: The Court has  
8 set aside this time to hear the matter of  
9 CV-07-166-VLG-CSO, *Timothy McCollough v. Johnson*  
10 *Rodenburg*, for a jury trial.

11 THE COURT: Is the plaintiff  
12 ready to proceed?

13 MR. HEENAN: We are, Your Honor.

14 THE COURT: Is the defendant  
15 ready to proceed?

16 MR. SIMPSON: Yes, we are, Your  
17 Honor.

18 THE COURT: Ladies and gentlemen,  
19 the first part of a trial is jury selection. And  
20 juries, in our system of government, can't be  
21 hand-picked. They can't be appointed by any  
22 particular person or persons. They have to be  
23 chosen at random under our Constitution and the  
24 statutes that govern the procedures that the  
25 Court follows.



1                   So what that means is that long  
2     before you appear here in court, the federal  
3     court gets lists of licensed drivers in Montana  
4     and registered voters. Then, if there are  
5     duplicates, if you are, and I hope you are, both  
6     a licensed driver and a registered voter, your  
7     name will only appear once. Then a computer  
8     program is applied to those names and they are  
9     chosen at random. So from that entire group, and  
10    of course it's a large group of citizens in  
11    Montana, you were chosen at random.

12                  Now, we will choose a jury of  
13    seven people. And this random process will  
14    continue now and I'll explain it to you as we go  
15    through it. And so we will have 13 of you come  
16    up and take seats in the jury box here, and after  
17    that occurs, then I will explain to you further  
18    how we will proceed.

19                  First I will ask the clerk to  
20    administer an oath to you. Sometimes you hear  
21    lawyers refer to this part of the process as voir  
22    dire. It's a Latin phrase meaning to speak the  
23    truth. The reason it's called voir dire, you  
24    will take an oath in just a minute to tell the  
25    truth in response to questions that are asked.

1                   Please administer the oath.

2                   (ALL PRESENT are duly sworn under oath.)

3                   THE COURT: Now, as I explained,  
4           this random process will begin. The clerk of  
5           court here has all of your names in what we call  
6           the wheel here. She will at random draw names  
7           out.

8                   If your name is called, I'm going  
9           to ask you to come and sit in the jury box. I  
10          know there is no room for you there, but I ask  
11          the jurors already in the jury box to stand back  
12          by the security office and leave the number on  
13          the chair on the chair, and I will explain how  
14          those are used.

15                  THE CLERK: Number one, Amy  
16          Conlin.

17                  THE COURT: Now, if you will go  
18          up, I think the chair in the back has the number  
19          one, closest to the bench here, and just sit in  
20          the chair marked number one and just hold the  
21          card for a minute.

22                  THE CLERK: Number two, Vickie  
23          Rae Harris; number three, Avonne Elvick Johnson;  
24          number four, David Huntley; number five, Sally  
25          Sjaastad; number six, Sandra Bey; number seven,

1 Kelly Lynn Bergsing; number eight, Linda  
2 Thompson; number nine, Mavis Kloppel; number 10,  
3 Randel Bonifay; number 11, Arlon Franz; number  
4 12, Connie Rasmussen; number 13, Tanner Egan.

5 THE COURT: Now, this process  
6 continues. I'm going to ask the people who are  
7 seated in the jury box here questions. And the  
8 questions will include questions about background  
9 and attitudes and other information. And the  
10 purpose of this is to get a jury seated that is  
11 both able and willing to consider the issues in  
12 this case impartially.

13 Now, my questions will be  
14 primarily directed to, as I said, the people in  
15 the box. However, for those of you whose names  
16 were not called and are in the back of the  
17 courtroom, listen carefully to the questions I  
18 ask. It is possible that I will have to excuse,  
19 for some reason, one of the jurors who are seated  
20 in the jury box. And if and when that happens,  
21 I'll ask the clerk to pull another name out of  
22 the wheel here, and it very well may be yours.

23 If it is, to save time, instead  
24 of going through the questions again, I will ask  
25 you if you would have answered affirmatively to

1 any of the questions that I asked. That will  
2 save some time. So I ask you to listen carefully  
3 as we proceed.

4 Now, the questions that we ask  
5 are, as I said, to assist the Court and the  
6 parties in getting a jury seated that's able to  
7 impartially hear the evidence in the case, and to  
8 allow the attorneys to exercise what we call  
9 preemptory challenges or challenges for which no  
10 cause need be given. Our purpose is never to pry  
11 or to embarrass anybody.

12 If a question is asked that, for  
13 whatever reason, you don't want to discuss in  
14 front of all the people here in the courtroom,  
15 tell me that and we will go back into my chambers  
16 and discuss whatever it is there. There is  
17 nothing wrong with that.

18 So again, we don't want to make  
19 you uncomfortable. We very much appreciate your  
20 willingness to be here and serve. Our system of  
21 justice simply wouldn't work if there weren't  
22 people such as yourselves who are willing to come  
23 and participate in the process and sit on a jury  
24 and fairly hear the evidence presented.

25 So that said, let me tell you

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1       that the lawyers here tell me that this case will  
2       take three or four days to complete. I'm quite  
3       confident we will complete it by the end of the  
4       week, but it will take the better part of the  
5       week.

6                       Is there anyone in the jury box  
7       for whom that would be a problem? Ms. Conlin.

8                       MS. CONLIN: I have a first  
9       grader and she has a program on Friday. I need  
10      to leave and go back to Sidney on Thursday.

11                      THE COURT: I'm going to ask you  
12      a few more questions about that, and let me tell  
13      you why. Serving on a jury necessarily asks  
14      people to take time out of their normal course of  
15      life, their work, their family, and it's a  
16      sacrifice. But everybody is asked to make that  
17      sacrifice.

18                      Sometime it's just too much.  
19      Sometimes you can't do it. And in that case,  
20      then, you're excused. But if it's just life  
21      going on and you're having to set something else  
22      aside, then we ask people to do that. Otherwise  
23      we wouldn't get a jury.

24                      So if it's a program that you're  
25      not required to be there for -- I'm going to ask

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1       you, do you need to be there?

2                       I understand we all want to be  
3       there. I have kids too. We all want to be there  
4       but we don't always need to be there.

5                       Is this something that your  
6       presence is required?

7                       MS. CONLIN: It's just for the  
8       parents, and her father is not in the picture so  
9       I would be her only person there.

10                      THE COURT: What kind of program  
11       is it?

12                      MS. CONLIN: It's a first grade  
13       play.

14                      THE COURT: I will excuse you.  
15       You're free to go.

16                      Would you call another name,  
17       please?

18                      THE CLERK: Carolyn Hamlin  
19       Wenger.

20                      THE COURT: Be careful, there is  
21       a step up. You kind of have to be a gymnast to  
22       get back in there, I'm afraid.

23                      Ms. Wenger, as I said, this case  
24       will take about three or four days to complete.  
25       Does that pose any problems for you?

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1 MS. WENGER: No.

2 THE COURT: Now, this action  
3 arises out of debt-collection activities that  
4 were directed at Mr. Timothy McCullough by the  
5 Johnson, Rodenburg & Lauinger law firm. Mr.  
6 McCullough brought this action alleging that  
7 Johnson, Rodenburg & Lauinger violated the Fair  
8 Debt Collection Practices Act and Montana law in  
9 its debt-collection activities against Mr.  
10 McCullough.

11 Have any of you heard or read  
12 anything about this case?

13 MR. BONIFAY: I've seen a little  
14 bit in the paper about it. That it was going to  
15 happen.

16 THE COURT: Mr. Bonifay?

17 MR. BONIFAY: Yes.

18 THE COURT: Was there anything  
19 that you heard or read that would prejudice you  
20 one way or the other, or cause you to give more  
21 weight to one side or the other?

22 MR. BONIFAY: Not really.

23 THE COURT: Could you set that  
24 aside and, if you're chosen here, base a verdict  
25 solely on the evidence presented here in the

1 courtroom?

2 MR. BONIFAY: Absolutely.

3 THE COURT: I would now like to  
4 introduce the attorneys here. Mr. McCullough is  
5 represented by John Heenan of the Heenan Law Firm  
6 in Billings. Would you please stand up?

7 MR. HEENAN: Thank you, Your  
8 Honor.

9 THE COURT: Do any of you know  
10 Mr. Heenan? Have you had any dealings with him  
11 whatsoever?

12 Thank you, Mr. Heenan.

13 The defendant is represented by  
14 Mr. John Bohyer and Mr. Fred Simpson of the law  
15 firm Bohyer, Simpson and Tranel in Missoula.

16 Have any of you had any dealings  
17 or do you know Mr. Bohyer or Mr. Simpson in any  
18 regard? Okay.

19 Thank you. You may be seated.

20 Now I will ask the lawyers to  
21 introduce to you their clients. And I will ask  
22 you similar questions with respect to whether you  
23 know them.

24 Please introduce your client, Mr.  
25 Heenan.



1 MR. HEENAN: Seated to my right  
2 is the plaintiff in this case, Mr. McCullough.

3 THE COURT: Do any of you know  
4 Mr. McCullough?

5 Okay, thank you.

6 Mr. Simpson, would you please  
7 introduce your client.

8 MR. SIMPSON: Thank you. This is  
9 Lisa Lauinger of the law firm Johnson, Rodenburg  
10 & Lauinger in Bismarck, North Dakota.

11 THE COURT: Do any of you know  
12 Mrs. Lauinger?

13 Thank you, you may be seated.

14 Now I'm going to read to you a  
15 list of people who I anticipate may be witnesses  
16 called to testify in this case. And I will ask  
17 you the same question. That is, whether any of  
18 you know any of these witnesses.

19 Mr. Charles Dendy is a lawyer in  
20 the law firm of Johnson, Rodenburg & Lauinger.  
21 Do any of you know Mr. Charles Dendy? Grace  
22 Lauinger? Dr. Joseph McElhinney?

23 Yes?

24 A JUROR: I know him kind of  
25 professionally. He has done evaluations for

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1 clients of mine in the past. I don't know him  
2 personally.

3 THE COURT: So you've had some  
4 professional connection with him.

5 A JUROR: Right.

6 THE COURT: Is there anything in  
7 the association that you've had with him or the  
8 knowledge that you have with him that would cause  
9 you to give more weight to his testimony than to  
10 others?

11 A JUROR: No.

12 THE COURT: I will ask you the  
13 converse side of that. Is there anything that  
14 would cause you to give less weight to anything  
15 in that that would make it difficult for you to  
16 hear his testimony and give it the weight that it  
17 deserves based on what is said here in the  
18 courtroom?

19 A JUROR: No.

20 THE COURT: Kerri Henan.

21 MR. HEENAN: Henan, no relation.

22 THE COURT: Kerri Henan? Ken  
23 Lucero? Any of you know Ken Lucero? Robert,  
24 sometimes called Bob, Dunker. He is from Denver,  
25 Colorado. Do any of you know Mr. Robert Dunker?

1 Michael Eakin, who is a lawyer here in Billings.  
2 Do any of you know Mr. Eakin? And Mr. James  
3 Patten, who is also a lawyer here in Billings.  
4 Do any of you know Mr. Patten? Doraleen  
5 McCullough. Do any of you know Doraleen  
6 McCullough? Dr. Donna Veraldi? Do any of you  
7 know Dr. Donna Veraldi? And Dr. David  
8 Yelvington? Okay.

9 Have any of you ever before  
10 served as a juror in a civil or criminal case, or  
11 as a Grand Juror in any court? Okay. There is a  
12 couple of you.

13 Ms. Thompson, first of all, where  
14 did you serve as a juror, just so we are clear?

15 MS. THOMPSON: Here in Billings.

16 THE COURT: In state or federal  
17 court?

18 MS. THOMPSON: I believe it was a  
19 state court.

20 THE COURT: How long ago?

21 MS. THOMPSON: Probably 20 years  
22 or more.

23 THE COURT: These questions may  
24 be unfair, then. Do you remember if it was a  
25 cervical or criminal case?

1 MS. THOMPSON: Criminal.

2 THE COURT: Do you remember what  
3 the charge was?

4 MS. THOMPSON: Child abuse.

5 THE COURT: This is a civil case,  
6 not a criminal case. So at the end of the trial,  
7 I will instruct you on the law and there is a  
8 different burden of proof that applies in a civil  
9 case as opposed to a criminal case. Could you  
10 listen to the instructions on the law that I give  
11 you and follow those instructions?

12 MS. THOMPSON: Yes.

13 THE COURT: Any other prior jury  
14 service?

15 MS. THOMPSON: No.

16 THE COURT: Someone else? Yes,  
17 Ms. Rasmussen.

18 MS. RASMUSSEN: It was in Sidney,  
19 about 20 years ago, and it was criminal.

20 THE COURT: Do you remember the  
21 charge in that case?

22 MS. RASMUSSEN: No, I do not.

23 THE COURT: Similarly, could you  
24 listen to the instructions that I give and follow  
25 them?

1 MS. RASMUSSEN: Yes.

2 THE COURT: Mr. Egan?

3 MR. EGAN: In Butte, Montana,  
4 about six years ago. It was civil.

5 THE COURT: Was it state or  
6 federal court?

7 MR. EGAN: State, I believe.

8 THE COURT: What kind of case was  
9 it?

10 MR. EGAN: It was a land dispute.

11 THE COURT: What kind of dispute  
12 was it, do you remember?

13 MR. EGAN: Yes, they had a  
14 friendly handshake agreement, apparently, nothing  
15 in writing, on who owned this part of the land  
16 type deal.

17 THE COURT: Do you remember what  
18 the verdict was?

19 MR. EGAN: Yes, it was for the  
20 defendant.

21 THE COURT: Of course, this is a  
22 separate case with separate claims and different  
23 parties. You understand that?

24 MR. EGAN: Mm-hmm.

25 THE COURT: So is there anything

1 in your prior experience in that civil case that  
2 you would carry with you that would make it  
3 difficult for you for any reason to listen to the  
4 evidence in this case fairly?

5 MR. EGAN: No.

6 THE COURT: Anybody else? Prior  
7 jury service or Grand Jury service?

8 Have you or anyone in your  
9 immediate family ever participated in a lawsuit  
10 either as a party or a witness in any kind of  
11 suit?

12 Yes, Mr. Bergsing. What kind of  
13 case was it?

14 MR. BERGSING: It was a lease  
15 case over farming some land.

16 THE COURT: Were you a party?

17 MR. BERGSING: No, I wasn't. I  
18 was a witness.

19 THE COURT: Just generally, what  
20 was your testimony?

21 MR. BERGSING: I had worked for  
22 people leasing it and the lease was terminated so  
23 I had to testify how many times I helped farm the  
24 ground.

25 THE COURT: Is there anything in

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1       that experience that would in any way make it  
2       difficult for you to sit and listen to witnesses  
3       in this case fairly?

4                   MR. BERGSING:   No, ma'am.

5                   THE COURT:   Anybody else?   Yes,  
6       Mrs. Sjaastad.

7                   MS. SJAASTAD:   I was a witness in  
8       a criminal case, but I was 17 so it was quite a  
9       while ago.

10                  THE COURT:   Is there anything in  
11       that experience that you would think would make  
12       it difficult for you to listen to witnesses here?

13                  MS. SJAASTAD:   No.

14                  THE COURT:   Anyone else?

15                  A JUROR:   Custody.

16                  THE COURT:   How long ago was  
17       that?

18                  A JUROR:   About 10 years.

19                  THE COURT:   Could you set aside  
20       anything in that experience and base a verdict in  
21       this case based on what the parties present to  
22       you in evidence here?

23                  A JUROR:   Yes, I could.

24                  THE COURT:   Anybody else?   Okay.

25                  Have you or anybody in your

1 immediate family ever been sued for a debt?

2 MR. BONIFAY: I have. I had my  
3 wages garnished off my checks once.

4 THE COURT: Mr. Bonifay. Wages  
5 garnished. When was that?

6 MR. BONIFAY: 2005.

7 THE COURT: Are they still being  
8 garnished?

9 MR. BONIFAY: No.

10 THE COURT: For how long were  
11 they garnished?

12 MR. BONIFAY: It was only four or  
13 five months.

14 THE COURT: For a consumer debt?

15 MR. BONIFAY: For a debt to the  
16 hospital that didn't get paid.

17 THE COURT: As I told you, this  
18 claim is about debt-collection activities. And  
19 there may be, I don't know exactly what the  
20 parties will present as evidence, but there may  
21 be evidence about debt collection and the  
22 processes of debt collection.

23 Is there anything in your  
24 experience that would cause you to give undue  
25 weight to one side or the other? In other words,

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1       would it be difficult for any reason for you to  
2       set aside your own experience?

3                       MR. BONIFAY:   Probably so.   I  
4       would think I could do it.   Yeah.   I could set  
5       them aside.

6                       THE COURT:   You could set them  
7       aside.   Okay.   Do you have any lingering  
8       resentment or anything about the people that  
9       garnished your wages?

10                      MR. BONIFAY:   Not really, no.

11                      THE COURT:   Anybody else ever  
12       been sued for a debt or ever sued to collect a  
13       debt?

14                      Have any of you or your immediate  
15       family members ever received letters about a debt  
16       from a collection agency?

17                      Ms. Wenger, tell me about that,  
18       please.

19                      MS. WENGER:   I have a daughter  
20       that had some debts turned over to a collection  
21       agency.

22                      THE COURT:   What kind of  
23       experience did she have with that?

24                      MS. WENGER:   Pretty easy.   I paid  
25       them off.

1 THE COURT: She had it easy.  
2 Maybe you didn't. Is there anything in that  
3 experience that would personally make it hard for  
4 you to be fair to both sides here and listen to  
5 the evidence?

6 MS. WENGER: No.

7 THE COURT: Someone else  
8 indicated. Yes, sir, Mr. Bergsing.

9 MR. BERGSING: My wife got fairly  
10 sick 12 or 13 years ago and we accumulated a huge  
11 debt and I started receiving collection notices  
12 and we ended up claiming bankruptcy.

13 THE COURT: What year did you  
14 claim bankruptcy?

15 MR. BERGSING: I'm trying to  
16 remember. '97 or '8. I'm not sure.

17 THE COURT: Have you had any debt  
18 issues since that time?

19 MR. BERGSING: Not really. It  
20 was a medical type of bankruptcy.

21 THE COURT: I see. Now, the  
22 evidence in this case, as I've indicated, is  
23 about debt-collection activities. From your own  
24 experience, do you believe that you would in any  
25 way have a difficult time being fair to both

1 parties here?

2 MR. BERGSING: I shouldn't. I  
3 don't think I would.

4 THE COURT: Do you have a doubt  
5 about that?

6 MR. BERGSING: Maybe.

7 THE COURT: Why?

8 MR. BERGSING: Just because it  
9 was a very difficult time in my life.

10 THE COURT: It is now, what,  
11 about 12 years ago?

12 MR. BERGSING: Yes.

13 THE COURT: Do you believe you  
14 would be uncomfortable sitting in a case  
15 listening to testimony about debt issues?

16 MR. BERGSING: No, I wouldn't be  
17 uncomfortable.

18 THE COURT: As I told everyone  
19 when we started this process, the purpose of this  
20 process is to allow the Court to seek jurors who  
21 can impartially listen to the evidence and base  
22 the verdict on the evidence that comes in.

23 Sometimes, because of our own personal  
24 experience, it might be difficult for us to sit.  
25 But we are not expected to leave our common sense

1 or our own experiences and people and citizens at  
2 the courthouse door. You bring that with you.  
3 But we don't want either to make people  
4 uncomfortable or to have people that would just  
5 have a hard time setting aside their personal  
6 convictions.

7 So I guess I'm going to ask you,  
8 Mr. Bergsing, I know you said they were difficult  
9 and I understand that. Do you believe you could  
10 set those aside and be fair or do you think it  
11 would be too much to ask?

12 MR. BONIFAY: I think I could set  
13 them aside.

14 THE COURT: That you could?

15 MR. BERGSING: Yes.

16 THE COURT: All right. Anybody  
17 else or their immediate family receive letters?

18 Ms. Kloppel.

19 MS. KLOPPEL: My husband became  
20 disabled and before he got his disability, he got  
21 some collections but that's all been taken care  
22 of and that's been 10, 14 years.

23 THE COURT: From that experience,  
24 do you believe that you could set your own  
25 experience aside and listen to the evidence that

1 the parties here present?

2 MS. KLOPPEL: Yes.

3 THE COURT: And not give undue  
4 weight to one side or the other?

5 MS. KLOPPEL: No, I would not.

6 THE COURT: Anybody else or their  
7 immediate family ever receive letters about a  
8 debt from a debt-collection agency?

9 Now, Mr. Bergsing was telling us  
10 about his experience with bankruptcy. Have any  
11 of the rest of you either personally or an  
12 immediate family member been through a bankruptcy  
13 process or sought bankruptcy protection?

14 I will start with you, Ms.  
15 Thompson.

16 MS. THOMPSON: My husband went  
17 through a bankruptcy, but that was prior to our  
18 marriage.

19 THE COURT: Did you know him  
20 then?

21 MS. THOMPSON: No.

22 THE COURT: You weren't  
23 personally involved in any way?

24 MS. THOMPSON: No.

25 THE COURT: Mr. Bonifay.

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1 MR. BONIFAY: My parents went  
2 through a bankruptcy when I was about 14.

3 THE COURT: How long ago was  
4 that?

5 MR. BONIFAY: 10 years ago. I'm  
6 24 now.

7 THE COURT: Is there anything in  
8 that experience that would make it difficult for  
9 you to sit and listen to evidence that's  
10 presented about debt-collection activities?

11 MR. BONIFAY: That was a trying  
12 time, but I think I could set it aside, yes.

13 THE COURT: And be fair to both  
14 parties here?

15 MR. BONIFAY: Yep.

16 THE COURT: Anybody else or their  
17 immediate family members had any experience with  
18 bankruptcy?

19 Have any of you or an immediate  
20 family member ever been employed by a business or  
21 a law firm that engages in debt collection? Yes,  
22 ma'am.

23 A JUROR: I worked for an  
24 accounting firm and we did the books for a  
25 gentleman who did debt collection.

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1 THE COURT: Did you personally  
2 know that gentleman?

3 A JUROR: I met him a few times.

4 THE COURT: I gather you didn't  
5 know him well.

6 A JUROR: No.

7 THE COURT: Other than doing  
8 accounting for him, did you otherwise get  
9 involved in his debt-collection business?

10 A JUROR: No, but I do have some  
11 personal feelings about his personal ethics. But  
12 that was related specifically to him.

13 THE COURT: Was that his ethics  
14 with respect to debt collection or just on other  
15 things?

16 A JUROR: Just the whole across  
17 the board.

18 THE COURT: You understand he is  
19 not a party here.

20 A JUROR: Right. Right.

21 THE COURT: What he did or didn't  
22 do isn't relevant to this case. You understand  
23 that?

24 A JUROR: No, I understand that.

25 THE COURT: And the jury will be

1 instructed what they have to do is carefully  
2 listen to the evidence that both parties present  
3 here, consider that evidence, and base a verdict  
4 on that evidence.

5 A JUROR: Right.

6 THE COURT: Could you do that?

7 A JUROR: Yes.

8 THE COURT: Anyone else ever work  
9 for?

10 A JUROR: I worked at Sears, in  
11 the credit office, like 25 years ago. And one of  
12 the things I did was call people who were past  
13 due on their credit card payments.

14 THE COURT: Did you have any  
15 experiences there that would cause you to give  
16 either more emphasis or less emphasis to  
17 testimony about people who collect debts?

18 A JUROR: No.

19 THE COURT: Anybody else?

20 Okay. Let me explain to you what  
21 our typical day will be. We will begin at around  
22 8:30. We will take a midmorning break, 15, 20  
23 minutes so we can all use the facilities, stretch  
24 our legs. Then we will take about  
25 an-hour-and-15-minute lunch break, maybe hour and



1 a half, depending on how the evidence is coming  
2 in. We will take another mid afternoon break of  
3 about 15 to 20 minutes, and then we will conclude  
4 the day around five o'clock.

5 So we will, as you can see, take  
6 breaks periodically, but it does involve sitting  
7 and it does require jurors to be able to sit for  
8 more than an hour at a time and listen as the  
9 evidence comes in.

10 Is there any member of the panel  
11 here who has any kind of special disability or  
12 problem that would make that difficult? Okay.

13 Do any of you have any immediate  
14 family members or close friends who suffer from a  
15 serious mental illness?

16 I ask you that because there may  
17 be testimony in the trial about mental illness.  
18 So I need to ask if any of you have immediate  
19 family members or close friends who suffer from a  
20 serious mental illness. Ms. Sjaastad.

21 MS. SJAASTAD: I have a brother  
22 that has serious mental illness.

23 THE COURT: Do you mind telling  
24 us what that is?

25 MS. SJAASTAD: Schizophrenia.

1 THE COURT: If there is testimony  
2 about that type or other type of serious mental  
3 illness here, is there anything in your  
4 experience with your brother that would make it  
5 difficult for you to hear the evidence in this  
6 case and base your decision as a juror on what  
7 happens in this case, setting aside your own  
8 experience with your brother?

9 MS. SJAASTAD: No.

10 THE COURT: I didn't ask that  
11 question very well. Let me try it again.

12 Could you set your own  
13 experiences aside and base a decision on the  
14 evidence that comes in about the parties in this  
15 case?

16 MS. SJAASTAD: Yes.

17 THE COURT: There was someone  
18 else. Ms. Thompson.

19 MS. THOMPSON: My eldest son has  
20 obsessive-compulsive disorder, also posttraumatic  
21 stress syndrome. My youngest son has ADD.

22 THE COURT: I will ask you the  
23 same thing. If there is evidence in this case  
24 about serious mental illness or mental illness,  
25 could you listen carefully, setting aside your

1 own experiences and base a decision on the  
2 evidence that is offered here in the courtroom?

3 MS. THOMPSON: Yes.

4 THE COURT: Ms. Wenger.

5 MS. WENGER: I have a sister with  
6 serious major depression.

7 THE COURT: I would ask you the  
8 same question. Is there anything in your  
9 experience with your sister that would make it  
10 difficult for you to hear evidence about mental  
11 illness? That's a no?

12 MS. WENGER: That's a no.

13 THE COURT: You see the person  
14 working so hard in front of me? Her job is to  
15 record everything that is said. So we need to  
16 say things out loud to help her out.

17 Anyone else? Did I miss anyone?  
18 Mrs. Kloppel.

19 MS. KLOPPPEL: My husband has  
20 PTSD.

21 THE COURT: I would ask you the  
22 same question. Is there anything about your  
23 experiences with your husband's illness that  
24 would make it difficult for you to sit and hear  
25 testimony?

1 MS. KLOPPPEL: No.

2 THE COURT: And be fair to both  
3 sides?

4 MS. KLOPPPEL: Yes.

5 THE COURT: Anybody else? Ms.  
6 Harris?

7 MS. HARRIS: My husband has PTSD,  
8 and I don't know if this counts, but he was  
9 brain-injured in a horse accident.

10 THE COURT: How long was that?

11 MS. HARRIS: The injury?

12 THE COURT: Yes.

13 MS. HARRIS: Four years ago.

14 THE COURT: Would it be difficult  
15 for you to sit and hear testimony about mental  
16 illness?

17 MS. HARRIS: No.

18 THE COURT: You can follow  
19 instructions that you're to base your decision in  
20 this case about the evidence the parties present  
21 here?

22 MS. HARRIS: Yes.

23 THE COURT: Ms. Rasmussen.

24 MS. RASMUSSEN: My mom has  
25 Alzheimer's, dementia. She lives with me.

1 THE COURT: She lives with you?

2 MS. RASMUSSEN: Mm-hmm.

3 THE COURT: Again, would it be  
4 difficult for you to sit and listen to testimony  
5 about mental illness?

6 MS. RASMUSSEN: Not at all.

7 THE COURT: Anybody else? Did I  
8 miss anybody else? Okay.

9 I asked you about close friends  
10 or family members. Let me ask you if any of you  
11 have been employed by a business or otherwise  
12 worked with persons who have serious mental  
13 illnesses. I thought you might, Ms. Sjaastad.

14 MS. SJAADSTAD: I'm a vocation  
15 rehabilitation counselor with the state, and in  
16 our program we work with people with all kinds of  
17 disabilities, including serious mental illness,  
18 trying to get them back into employment.

19 THE COURT: Now, would you have  
20 any difficulty following the instructions of the  
21 Court about the law that applies here, and  
22 listening to the evidence that is presented? As  
23 I said, when I read the lists of people who I  
24 think may be witnesses here, we may hear from  
25 medical professionals. Could you listen to what

1       they have to say and base a verdict on what is  
2       presented here in the courtroom?

3                       MS. SJAADSTAD:   Yes.

4                       THE COURT:   Anybody else?   Yes,  
5       Ms. Johnson.

6                       MS. JOHNSON:   I work in the  
7       nursing home and we do have people there with  
8       mental illnesses that we work with.

9                       THE COURT:   I ask you the same  
10       question, then.   Could you listen carefully to  
11       the evidence that is presented here and base your  
12       decision on the evidence as presented in the  
13       courtroom here, setting aside your own  
14       experiences with other people?

15                      MS. JOHNSON:   Yes.

16                      THE COURT:   Anyone else?

17                      A JUROR:   I teach young children  
18       and I have worked with children with mental  
19       illness.

20                      THE COURT:   I don't believe there  
21       will be any testimony about children with mental  
22       illness here.   So is there anything in your  
23       experience that you think would make it difficult  
24       for you here?

25                      A JUROR:   No.

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1 THE COURT: Ladies and gentlemen,  
2 lawsuits are broken down into various parts,  
3 various laws apply to those parts and various  
4 theories apply to different parts. I will  
5 instruct you on the law at the end of the case  
6 about the different parts of law, different laws  
7 that apply to the claims that are made.

8 On one part of this case, I have  
9 made some rulings in advance. And you will hear  
10 the parties talk about the rulings that I have  
11 made in advance. The Fair Trade Practices Act  
12 that I mentioned to you was one of the claims the  
13 plaintiff made here. I made some rulings on that  
14 part of the case.

15 But that's a part of the case.  
16 It's not the whole case. And the rest of the  
17 case will be presented to the jury for the jury  
18 alone to decide based on the evidence that is  
19 presented.

20 The jury's job will be to listen,  
21 as I've said here, to the evidence that is  
22 presented, and to follow the Court's  
23 instructions, but not make up your mind ahead of  
24 time on what the verdict should be on the other  
25 parts of the case until all the evidence is in.

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1                   Would any of you have a hard time  
2     doing that? Could all of you agree to carefully  
3     listen to the evidence on these other parts of  
4     the case, even though the Court has made prior  
5     rulings on some of the laws that apply? Could  
6     you all agree to keep an open mind with respect  
7     to those questions that will be presented to the  
8     jury?

9                   Now, a jury questionnaire will be  
10    presented at the end with questions that the  
11    jury's to answer. Until all the evidence comes  
12    in, I won't know exactly what those questions  
13    are, but as I said, one of the questions that  
14    could have been presented I've already answered.  
15    But the other questions that are presented to you  
16    are for the jury alone to decide, not the Court.

17                  So if selected as a jury, would  
18    you be able to consider the evidence that is  
19    presented and apply the law that I give you in  
20    answering those questions? Is there anybody who  
21    believes they would have a difficult time doing  
22    that? Okay.

23                  Now, the instructions that I give  
24    you will be that you're not to do independent  
25    research. Because as I told you, the law



1 requires that verdicts be based on the evidence  
2 that the parties present to you here in the  
3 courtroom. Now, I'm not very technologically  
4 savvy. I've never sent a twitter. I don't know  
5 what a twitter really is. But some of you may.  
6 And the instructions will say that you can't  
7 write blogs, can't send twitters, in fact not  
8 even talk to other people, even your own family  
9 members or your own fellow jurors, until the case  
10 has been submitted to you for deliberation as a  
11 jury.

12 Would any of you have difficulty  
13 following these instructions? Could you all  
14 agree you could follow those instructions? Okay.

15 Now, in just a moment, I'm going  
16 to allow the lawyers for the parties to ask you  
17 some questions. But before I do that, I want to  
18 ask a general question. Based on what I asked  
19 you so far and the information I've given you so  
20 far, does any other reason suggest itself to any  
21 of you as to why you could not sit as a fair and  
22 impartial juror in this case?

23 Okay, seeing none, then, Mr.  
24 Heenan, you may inquire.

25 MR. HEENAN: Thank you, Your

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1 Honor.

2 Good morning, ladies and  
3 gentlemen. Again, my name is John Heenan and I  
4 represent the plaintiff, Timothy McCollough. I  
5 think Her Honor has fairly well covered  
6 everything or most everything that I was going to  
7 cover.

8 I guess it's important and I want  
9 to thank you, again, on behalf of Mr. McCullough  
10 for being here and participating in the process.

11 One of the issues that is going  
12 to come into play, and the judge has already  
13 touched on it, but you're going to hear some  
14 evidence, I think, about my client having a  
15 mental condition. And one of the claims that Mr.  
16 McCullough is making is what is called emotional  
17 distress, damages for how he reacted to  
18 something.

19 Is there anyone who is going to  
20 have a hard time considering what a reasonable  
21 person in Mr. McCullough's shoes would be  
22 feeling, based on the evidence you hear? Does  
23 that make sense?

24 Maybe that was a -- is there  
25 anyone that is going to be able to get outside of

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1       your own head and think about Mr. McCullough and  
2       what he was feeling? Anybody?

3                       One of the other issues that this  
4       jury is going to need to consider is punitive  
5       damages. And punitive damages are different then  
6       compensatory damages. They are damages to punish  
7       someone for doing something wrong.

8                       Is there anyone that would have a  
9       hard time following the judge's instructions and  
10      considering the evidence and awarding punitive  
11      damages if they are appropriate?

12                      There are some groups that say  
13      there should be a cap or a limit on how much  
14      juries are allowed to award for punitive damages  
15      regarding --

16                      MR. BOHYER: This is governed by  
17      statute, Your Honor. Objection.

18                      THE COURT: Well, there is a cap.  
19      But you may continue. I will overrule the  
20      objection.

21                      MR. HEENAN: Is there anyone who  
22      feels that a cap or a limit is appropriate? Yes.

23                      MS. THOMPSON: Yes, I feel a  
24      limit is appropriate.

25                      MR. HEENAN: What limit do you

1       feel is appropriate?

2                   MS. THOMPSON: I think it is  
3       individual to the case, but these ones where  
4       people are allowed millions of dollars, I don't  
5       agree with those.

6                   MR. HEENAN: It sounds like  
7       millions is too much in your mind. Is that fair?

8                   MS. THOMPSON: Yes.

9                   MR. HEENAN: How about one  
10      million? Is that too much in your mind?

11                  MS. THOMPSON: I think it would  
12      depend on the individual case.

13                  MR. HEENAN: So I guess what I'm  
14      talking about is caps, where they say no matter  
15      what the evidence is, a jury can't award more  
16      than this dollar figure.

17                  Do you think there should be that  
18      type of a cap that doesn't consider what the  
19      evidence is?

20                  MR. BOHYER: Your Honor, I renew  
21      my objection. There is a statute that governs  
22      this.

23                  THE COURT: I'm a little  
24      confused. You're getting into the law and there  
25      is a cap. I will again overrule the objection

1       since this is voir dire, but I don't want you to  
2       suggest there is not.

3                       MR. HEENAN:   Thank you, Your  
4       Honor.

5                       I'm not suggesting there is not.  
6       I'm trying to know from you, ma'am, what in your  
7       mind you think is an appropriate cap where the  
8       jury can't, regardless of what the evidence is,  
9       go past?

10                      MS. THOMPSON:   I don't know what  
11       the legal cap is, so I guess I couldn't make a  
12       judgement on that.

13                      MR. HEENAN:   How about just in  
14       general terms?   Would you have a hard time  
15       awarding punitive damages, period, because you  
16       don't believe in them?

17                      MS. THOMPSON:   No.   No.   I think  
18       in some cases they are justified.

19                      MR. HEENAN:   What types of cases?  
20       Or what circumstances, in general terms?

21                      MS. THOMPSON:   I don't know that  
22       I can outline a thing.   I think there are  
23       situations where companies have ignored certain  
24       protocols and the only way to keep them in line  
25       is to have a punitive amount attached, but I

1       don't believe in the amount of some of the  
2       judgements.

3                       MR. HEENAN: I think I  
4       understand.

5                       Mr. Huntley, do you agree with  
6       Ms. Thompson about that, what she said?

7                       MR. HUNTLEY: Well, I think some  
8       of these, sometimes there should be a cap. Some  
9       of these settlements are so outrageous.

10                      MR. HEENAN: What is outrageous  
11       to you?

12                      MR. HUNTLEY: You're getting into  
13       millions and millions of dollars. I think there  
14       should be a cap sometimes.

15                      MR. HEENAN: In terms of what you  
16       consider to be an outrageous punitive award,  
17       would it -- tell me what you think. I don't want  
18       to put words in your mouth.

19                      MR. HUNTLEY: Some of the  
20       lawsuits that are settled and monies that are  
21       distributed, some of those are just way too much,  
22       I think. I don't know. Sometimes a cap is  
23       necessary, I think.

24                      MR. HEENAN: From your  
25       perspective, what is way too much?

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1 MR. HUNTLEY: Well, I guess I  
2 can't tell you that. I don't know.

3 MR. HEENAN: What information  
4 would you want to hear to be able to have a  
5 better idea?

6 MR. HUNTLEY: I don't know.

7 MR. HEENAN: Would the  
8 circumstances of the particular case be something  
9 that you would want to know about?

10 MR. HUNTLEY: It depends on the  
11 circumstances of the case.

12 MR. HEENAN: And the practices  
13 that were at issue, would that be important to  
14 you?

15 MR. HUNTLEY: Yes.

16 MR. HEENAN: Would you be able to  
17 reserve judgement on having a bright line in your  
18 head on what is too much --

19 MR. HUNTLEY: Yes.

20 MR. HEENAN: -- until the  
21 evidence comes in?

22 MR. HUNTLEY: Yes.

23 MR. HEENAN: Does anyone disagree  
24 with Ms. Thompson or Mr. Huntley? Yes, ma'am.

25 MS. WENGER: I think that -- I'm

1 a nurse. And I think sometimes that high awards  
2 are very necessary when like loss of life or  
3 something like that occurs.

4 MR. HEENAN: Why would you  
5 consider them highly necessary?

6 MS. WENGER: Because I think that  
7 if there has been negligence or wrongdoing -- and  
8 this relates to medical, you know, more than  
9 anything else -- then it gets very difficult to  
10 put a price on a lost child or something, and I  
11 can understand high awards. I guess I understand  
12 them more than I'm a proponent of them.

13 MR. HEENAN: Let me ask you this,  
14 ma'am. If something is difficult to put a dollar  
15 value on, does that mean that the person claiming  
16 it isn't entitled to it? I guess what I'm asking  
17 you, like a loss of a life, that's a hard thing  
18 to say, you know, a dead child is worth this much  
19 money and a dead 80-year-old is worth this much  
20 money. But because it's hard to ascribe a dollar  
21 value doesn't mean the person making the claim is  
22 not entitled to it if the evidence supports it.  
23 Is that fair?

24 MS. WENGER: That's fair.

25 MR. HEENAN: Do you agree with



1 that?

2 MS. WENGER: Yes.

3 MR. HEENAN: Does anyone disagree  
4 with that, that some damages might be harder than  
5 others, but you have to consider the evidence?

6 I think that's all I have. Thank  
7 you, Your Honor.

8 Thank you, ladies and gentlemen.

9 THE COURT: Mr. Bohyer?

10 MR. BOHYER: Good morning. My  
11 name is John Bohyer and I represent Lisa Lauinger  
12 and Johnson, Rodenburg & Lauinger. The judge has  
13 given me 15 minutes to do this, and I'm  
14 ordinarily prone to speak quickly, so if I need  
15 to slow down, typically the first person to tell  
16 me so is the court reporter. So I will try to  
17 speak slowly, but I want to get some points out.

18 I want to ask a few questions  
19 about personal responsibilities in general. And  
20 in that regard, who among the jury panel has a  
21 credit card? Who among the panel believe, if you  
22 charge up your credit cards, you should be  
23 responsible to pay them?

24 Is there anyone that believes  
25 that if an individual charges them up and may

1 have a mental illness that maybe they shouldn't  
2 have to pay? Yes, ma'am. Ms. Harris.

3 MS. HARRIS: Well, I guess, for  
4 personal reasons, because my husband's brain  
5 injured, and we are actually kind of in the  
6 process of wondering if we should be monitoring  
7 his credit card.

8 MR. BOHYER: For what purpose?

9 MS. HARRIS: He makes poor  
10 choices.

11 MR. BOHYER: I want to make sure  
12 everyone understands here. My client is a law  
13 firm. My client is not somebody who owns debt.

14 Can you make that distinction  
15 between a credit card company or a debtor versus  
16 somebody who hires a law firm to represent them  
17 to go and collect a debt? Does that make sense?  
18 Ms. Thompson? Does that make sense?

19 MS. THOMPSON: Mm-hmm.

20 MR. BOHYER: Who among you have a  
21 lawyer?

22 MS. RASMUSSEN: Just with my mom.

23 MR. BOHYER: Do you expect your  
24 lawyer to represent you to the best of his or her  
25 ability?

1 MS. RASMUSSEN: Mm-hmm.

2 MR. BOHYER: Why?

3 MS. RASMUSSEN: That's what you  
4 hire them for.

5 MR. BOHYER: That's what my  
6 clients do. My clients are lawyers.

7 MS. RASMUSSEN: To do the best  
8 service that is needed.

9 MR. BOHYER: Anybody prior to  
10 today had to utilize the services of a lawyer?  
11 Quite a few of you. How many of you, in terms of  
12 hiring a lawyer, have actually had to come to  
13 court with a lawyer?

14 MS. RASMUSSEN: For my mom, yeah.

15 MR. BOHYER: And, yes, sir? Mr.  
16 Franz.

17 MR. FRANZ: Divorce.

18 MR. BOHYER: Did you hire a  
19 lawyer to do the best that he or she could do?

20 MR. FRANZ: Yes.

21 MR. BOHYER: Did they do so?

22 MR. FRANZ: Yes.

23 MR. BOHYER: What if they don't?  
24 You're not happy about that.

25 Am I accurate, Mr. Franz, you own

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1 a construction company?

2 MR. FRANZ: My father does.

3 MR. BOHYER: You work with your  
4 dad in the construction company?

5 MR. FRANZ: Yes.

6 MR. BOHYER: What type?

7 MR. FRANZ: Dirt construction.

8 MR. BOHYER: Do you ever have any  
9 issues with collecting debt with customers?

10 MR. FRANZ: Very few.

11 MR. BOHYER: On the few you've  
12 had, what have you had to do?

13 MR. FRANZ: I never do anything.  
14 That is all taken care of in the bookkeeping  
15 department. I have nothing to do with that.

16 MR. BOHYER: You send Moose and  
17 Rocco out to help them find the wallet, so to  
18 speak? That's what my mother used to tell me,  
19 Pay your bill.

20 MR. FRANZ: Most of our contracts  
21 are with states or companies that --

22 MR. BOHYER: Okay. Maybe that  
23 was a poor attempt at humor. Sometimes I try  
24 that in front of a jury because it's kind of  
25 nervous here, and I know my client is nervous

1 sitting here because she's never gone through  
2 this.

3 In terms of the overall process  
4 of a jury trial, things can get somewhat  
5 emotional. And typically for people, no question  
6 it's difficult for Mr. McCullough here.

7 Can you appreciate, though, that  
8 my client and the law firm, even though they are  
9 lawyers, they may not be really comfortable  
10 getting hauled into court either? Does that make  
11 sense to everybody? Okay.

12 Mr. McCullough's counsel had  
13 asked you a few questions about punitive damages.  
14 I want to ask you a few questions about damages  
15 as well.

16 Is there anyone on the panel who  
17 believes that because Mr. McCullough sued my  
18 client he's entitled to money at all? Anybody  
19 who believes, as we sit here today, I'm giving  
20 the guy some money? Okay.

21 That gets into burden of proof.  
22 And the plaintiff has to prove to you, A, not  
23 only did my client violate the law, but also that  
24 it actually caused some sort of damage. Does  
25 that make sense?

1                   Let's take, for example, someone  
2     can run through a stop sign but doesn't actually  
3     hit the car that is going the other way. Might  
4     have scared you a little bit, but it didn't hit  
5     anybody. Does that make sense to everybody?  
6     Okay.

7                   Does everybody on the jury panel  
8     understand that anyone can file a lawsuit in  
9     America? It's one of the great things about our  
10    country and our justice system. You pay your  
11    filing fee, a hundred bucks or 150, or maybe in  
12    the federal system it's quite a bit more now.  
13    You can sue the Queen of England, if you wanted.

14                  And my clients aren't here by  
15    choice. They have been sued. They have been  
16    hauled into court.

17                  Would you all agree with me that  
18    a defendant -- this is a civil case, not a  
19    criminal case. No one is going to jail here --  
20    but a defendant or a law firm such as my client,  
21    they are entitled to come into court with a  
22    lawyer, like me and Mr. Simpson, and defend  
23    themselves. We are entitled to put on evidence  
24    and, at the end of the case, if the evidence  
25    suggests, I'm going to ask you, and Mr. Simpson

1 will ask you, no money. Does that make sense to  
2 everybody?

3 Does anybody think they would  
4 have a problem doing that? Anybody? Yes, sir.

5 A JUROR: No.

6 MR. BOHYER: Okay. The judge had  
7 already told you she had made some rulings on it.  
8 I'm not going to get into a significant  
9 discussion of the law, other than to tell you  
10 that she has already concluded that our client  
11 violated the Fair Debt Collection Practices Act  
12 by filing a lawsuit after a statute of  
13 limitations ran.

14 Does everybody understand what a  
15 statute of limitations is?

16 Ms. Thompson, what does that mean  
17 to you? I don't mean to put you on the spot  
18 here.

19 MS. THOMPSON: It means there is  
20 a certain period of time within which an action  
21 has to take place and, after that period of time,  
22 it's no longer allowed.

23 MR. BOHYER: Exactly. You passed  
24 the law school exam right there.

25 Now, some of the fact issues that

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1       you're going to get to decide have to do with the  
2       why and how our client filed that thing after the  
3       statute of limitations. That's one of the issues  
4       I want to ask you, if you're willing to listen to  
5       how this happened and why.

6                       Everybody here understands the  
7       difference between making a mistake or an error  
8       and doing something on purpose, intentionally?

9                       How many of you have made the  
10      proverbial mistake? I will be first. Run  
11      through the stop sign and maybe hit the car.  
12      Anybody going to admit they did it on purpose?  
13      Okay.

14                      But that's what I'm getting at  
15      here, the difference between making an error and  
16      doing something on purpose, cheating. Those are  
17      some of the fact issues that you will listen to.

18                      Anybody have any preconceived  
19      bias against lawyers?

20                      Go ahead, Ms. Harris.

21                      MS. HARRIS: I guess, just to be  
22      honest, I feel like there is probably more, that  
23      you might have more options, more money, more  
24      education, than others.

25                      MR. BOHYER: Would you hold that

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1       against lawyers that are defendants in a lawsuit  
2       because they are educated and got through school?

3                   MS. HARRIS:   Maybe mostly the  
4       ability to hire, because you have more money.

5                   MR. BOHYER:   Do you agree that  
6       Ms. Lauinger and her law firm are entitled to a  
7       fair trial?

8                   MS. HARRIS:   Yes.

9                   MR. BOHYER:   That's what I'm  
10      getting at.   Can you, Ms. Harris, give that  
11      lawyer a fair shake?

12                  MS. HARRIS:   Yes.

13                  MR. BOHYER:   Even with that  
14      preconceived notion?

15                  MS. HARRIS:   Mm-hmm.

16                  MR. BOHYER:   You mentioned that  
17      your husband has a brain injury.   Is he a  
18      rancher?   Is he able to work still?

19                  MS. HARRIS:   Limited.

20                  MR. BOHYER:   Put forth his best  
21      effort at doing it?

22                  MS. HARRIS:   Mm-hmm.

23                  MR. BOHYER:   Does he pay his  
24      bills?

25                  MS. HARRIS:   Yes.

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1 MR. BOHYER: How does everybody  
2 feel about personal responsibility in the country  
3 right now with the economy? I see some eyes  
4 rolling. That's why I asked the question. Ms.  
5 Kloppel?

6 MS. KLOPPPEL: I think that the  
7 auto companies need to take care of themselves  
8 and we should not have to be paying for it.

9 MR. BOHYER: Does that kind of  
10 get everybody?

11 How about folks that buy the  
12 million dollar house on the minimum-wage job?  
13 Shaking the heads there. All right.

14 MS. JOHNSON: I think the banks  
15 also have, it's not just the person, because the  
16 banks, you know, were misleading in the  
17 mortgages.

18 MR. BOHYER: That's a shared  
19 responsibility, in your view.

20 MS. JOHNSON: Right.

21 MR. BOHYER: I guess that just  
22 gets back to my original -- and I don't  
23 necessarily disagree with you, gets back to my  
24 initial inquiry about personal responsibility.

25 Has anybody ever tried to collect

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1 a debt? Has anybody ever been in a business  
2 relationship that had to get money from somebody?  
3 Yes, ma'am.

4 A JUROR: I worked in the credit  
5 office so I had to call people to get them to pay  
6 their debts on the credit cards.

7 MR. BOHYER: Did you try to do  
8 that fairly, to the best of your ability, and  
9 politely?

10 A JUROR: Oh, yes.

11 MR. BOHYER: Did you ever make a  
12 mistake?

13 A JUROR: In what they owed?

14 MR. BOHYER: Sure.

15 A JUROR: No, it was printed out  
16 in documents.

17 MR. BOHYER: Did you rely on the  
18 printout that you were looking at?

19 A JUROR: Yes.

20 MR. BOHYER: What if the printout  
21 was wrong?

22 A JUROR: That could have  
23 happened.

24 MR. BOHYER: The point is, had  
25 you done that, would you have been trying to

1 collect on it intentionally, on purpose, to do  
2 something wrong?

3 A JUROR: No.

4 MR. BOHYER: Anybody else?

5 MR. BONIFAY: I work for Conlin  
6 Furniture doing deliveries, and sometimes we have  
7 to pick up cash on deliveries.

8 MR. BOHYER: COD?

9 A JUROR: Yeah, and there have  
10 been situations where the customer has a  
11 discrepancy in what they owe and what we say they  
12 owe, and we have to figure it out with the  
13 warehouse, sometimes just call them up and figure  
14 out what is going on with it.

15 MR. BOHYER: So that is typically  
16 worked out.

17 MR. BONIFAY: Mm-hmm.

18 MR. BOHYER: Ms. Wenger?

19 MS. WENGER: I'm on the board of  
20 directors for a local healthcare organization and  
21 we make the decisions about whether or not to  
22 turn outstanding accounts over to collections.

23 MR. BOHYER: That's from a  
24 nursing home?

25 MS. WENGER: No. It's for

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1 Riverstone Health.

2 MR. BOHYER: I'm sorry. Are  
3 those accounts placed for collection sometimes?

4 MS. WENGER: We are in the  
5 process of changing our policy. We have always  
6 had a policy that they have just gone to bad  
7 debt, and now we are in the process of changing  
8 that.

9 THE COURT: Two minutes.

10 MR. BOHYER: Folks, I expect  
11 you're going to hear some evidence about mental  
12 illness. I want you to know that on behalf of  
13 our clients we need to ask some questions about  
14 those issues to get the facts before you and so  
15 you can have a measure, kind of, of what was  
16 before and what was after our client's  
17 involvement. Does that make sense to everybody?

18 Can you view that with a fair  
19 mind and say, at least internally, gee, I'm not  
20 going to hold that against either the lawyer or  
21 the client because they're asking about the  
22 issue. Okay?

23 One of the last things I wanted  
24 to ask you, there are times during a trial a  
25 lawyer will -- and I already did -- stand up and

1 object. Do you understand the lawyer is there to  
2 protect their client?

3 And I've been doing this for 23  
4 years now, and I always live in mortal fear that  
5 during a trial I will do something, or, in this  
6 case, my partner, Mr. Simpson, will do something  
7 that is going to offend the jury. In finishing  
8 this, what I want to do is say, can you separate  
9 me from the client? Understand that I'm trying  
10 to work, and Mr. Simpson is trying to work, for  
11 the client. So if I do something that might rub  
12 you the wrong way, that's not Lisa Lauinger and  
13 it's not the law firm. Is that fair? Okay.

14 Anybody believe they couldn't be  
15 fair to my clients? Okay.

16 Your Honor, we may have a couple  
17 in chambers. I'm done. Thank you.

18 Thank you, ladies and gentlemen.

19 THE COURT: Do both parties pass  
20 the jury for cause?

21 MR. HEENAN: We do, on behalf of  
22 the plaintiff.

23 MR. BOHYER: We have one issue to  
24 raise.

25 THE COURT: If you will excuse us

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1 for a moment while we step into chambers.

2 (Brief recess.)

3 (The following discussion took  
4 place in chambers:)

5 THE COURT: The record will  
6 reflect that we are in chambers, just counsel  
7 present.

8 Mr. Bohyer?

9 MR. BOHYER: We have a challenge  
10 for cause with respect to Juror Number 10, Randel  
11 Bonifay, based on not only his parents'  
12 bankruptcy but him being sued on a debt  
13 collection and having his wages garnished for a  
14 period of five months.

15 THE COURT: That doesn't -- none  
16 of those experiences preclude someone from  
17 serving as a juror. And I did ask him whether  
18 anything in those experiences would cause him to  
19 give undue weight to one side or cause him to be  
20 unfair to one side or the other, and his answer  
21 was no.

22 You had plenty of opportunity to  
23 follow up and ask questions about that and you  
24 chose not to. So I'm a little confused about the  
25 challenge for cause now, when he said, despite

1       those experiences, he could be fair.

2                       MR. BOHYER: Well, it's a  
3       discretionary one, Your Honor. I raise it on the  
4       record, based upon the Court's inquiry.

5                       THE COURT: Does the plaintiff  
6       wish to respond?

7                       MR. HEENAN: No, Your Honor.

8                       THE COURT: I will refuse that  
9       challenge for cause.

10                      MR. BOHYER: I think that was the  
11       only one.

12                      THE COURT: Okay.

13                      (Brief recess.)

14                      THE COURT: Court is in session.

15                      In just a moment, I'll have the  
16       clerk read the names of the people who will be  
17       seated as the jury in this case. And while she  
18       is getting prepared to do that, I want to express  
19       my appreciation to all of you who have  
20       participated with us in the process. As I told  
21       you at the outset, the purposes of the question  
22       is never to pry or embarrass but to do the best  
23       we can in the process to ensure a fair trial for  
24       the parties, which they are entitled to here in  
25       court.



1                   You were very responsive and  
2     forthcoming and I thank you for that. For those  
3     of you sitting in the back, too, you also  
4     performed a valuable service here by your very  
5     presence because we never know exactly how many  
6     jurors we are going to need, but we need to call  
7     enough that we know that we can seat a jury that  
8     can comfortably and impartially hear the case and  
9     that we have a random jury. In order to do that,  
10    we have to call more than we need so that we  
11    ensure, as I explained earlier, the randomness of  
12    the process in selecting the jury.

13                  So I express my appreciation  
14    personally and the appreciation of the federal  
15    court for your willingness as citizens to come  
16    and participate in the process by your presence.

17                  Will the clerk please read the  
18    names of the jurors.

19                  THE CLERK: Avonne Johnson, Sally  
20    Sjaastad, Sandra Bey, Kelly Bergsing, Mavis  
21    Kloppel, Connie Rasmussen and Tanner Egan.

22                  THE COURT: If your name was not  
23    read, you're free to go. If your name was read,  
24    we will take a 10-minute recess and then please  
25    come back and be seated in the jury panel and we

1 will start the next part of the trial. We will  
2 be in recess.

3 (Brief recess.)

4 THE COURT: Would you swear the  
5 jury, please.

6 (Whereupon the members of the  
7 jury are duly sworn.)

8 THE COURT: You're not all  
9 required to be in the back row. If any of you  
10 want to come to the front row, you certainly may.  
11 Also, we want you to be comfortable. I think the  
12 clerks have water for you in there. If you want  
13 to bring in a bottle of water to drink as you  
14 listen, you may. If there is anything else we  
15 can do to make you comfortable, and if we can do  
16 it, mention it to the clerk and we will do what  
17 we can.

18 Ladies and gentlemen, you are now  
19 the jury in this case. It's my duty, as I  
20 mentioned earlier, to instruct you on the law.  
21 These are preliminary instructions to help you  
22 understand the principles that apply to civil  
23 trials, and help you understand the evidence as  
24 you listen to it.

25 You will be allowed to keep this

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1 set of instructions throughout the trial, to  
2 which you may refer. We will give them in  
3 writing to you. This set of instructions is not  
4 to be taken home and must remain in the jury room  
5 when you leave in the evenings. At the end of  
6 trial, I will give you a set of instructions, the  
7 final set of instructions, which will govern your  
8 deliberations.

9                   You must not infer from these  
10 instructions or anything I may say or do as  
11 indicating that I have an opinion to what your  
12 verdict should be. It is your duty to find the  
13 facts from all the evidence in this case. To  
14 those facts you will apply the law as I give it  
15 to you. You must follow the law as I give it to  
16 you whether you agree with it or not, and you  
17 must not be influenced by any personal likes,  
18 dislikes, opinions, prejudices or sympathy. That  
19 means you must decide the case solely on the  
20 evidence before you. You will recall that you  
21 took an oath to do so. In following my  
22 instructions, you must follow all of them and not  
23 single out some and ignore others. All are  
24 important.

25                   The evidence you are to consider

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1 in deciding what the facts are consists of,  
2 number one, the sworn testimony of any witness;  
3 number two, the exhibits that are received into  
4 evidence; and number three, any facts to which  
5 the lawyers have agreed.

6 In reaching your verdict, you may  
7 consider only the testimony and exhibits received  
8 into evidence. Certain things are not evidence  
9 and you may not consider them in deciding what  
10 the facts are. I will list these for you.  
11 Number one, arguments and statements by lawyers  
12 are not evidence. The lawyers are not witnesses.  
13 What they say --

14 I'm going to clarify. There will  
15 be lawyers who testify as witnesses. And those  
16 witnesses, you must hear their testimony and give  
17 it the weight you think it deserves.

18 This instruction applies to the  
19 lawyers who are appearing here as representatives  
20 for the parties. The arguments and statements  
21 that they make on behalf of their clients who are  
22 parties here are not evidence. Those lawyers are  
23 not witnesses. What they say in their opening  
24 statements and closing arguments and at other  
25 times is intended to help you interpret the

1 evidence, but it is not itself evidence. If the  
2 facts as you remember them differ from the way  
3 the lawyers state them, your memory of them  
4 controls.

5 Number two, questions and  
6 objections by the lawyers representing these  
7 parties are not evidence. Attorneys have a duty  
8 to their clients to object when they believe a  
9 question is improper, under the Rules of  
10 Evidence. You should not be influenced by the  
11 objection or by the Court's ruling on it.

12 Number three, testimony that has  
13 been excluded or stricken or that you have been  
14 instructed to disregard is not evidence and must  
15 not be considered. In addition, sometimes  
16 testimony and exhibits are received only for a  
17 limited purpose. If I give you a limiting  
18 instruction, you must follow it.

19 And number four, anything that  
20 you may have seen or heard when the Court was not  
21 in session is not evidence. You are to decide  
22 the case solely on the evidence received at the  
23 trial.

24 Evidence may be direct or  
25 circumstantial. Direct evidence is direct proof

1 of a fact, such as testimony by a witness about  
2 what that witness personally saw or heard or did.  
3 Circumstantial evidence is proof of one or more  
4 facts from which you could find another fact.  
5 You should consider both kinds of evidence. The  
6 law makes no distinction between the weight to be  
7 given to either direct or circumstantial  
8 evidence. It is for you to decide how much  
9 weight to give to any evidence.

10 There are Rules of Evidence that  
11 control what can be received into evidence. When  
12 a lawyer asks a question or offers an exhibit in  
13 evidence and a lawyer on the other side thinks it  
14 is not permitted by the Rules of Evidence, that  
15 lawyer may object. If I overrule the objection,  
16 the question may be answered or the exhibit  
17 received. If I sustain the objection, the  
18 question cannot be answered and the exhibit  
19 cannot be received.

20 Whenever I sustain an objection  
21 to a question, you must ignore the question and  
22 must not guess as to what the answer might have  
23 been. Sometimes I may order that evidence be  
24 stricken from the record and that you disregard  
25 or ignore the evidence. That means when you're

1       deciding the case you must not consider the  
2       evidence that I told you to disregard.

3                       In deciding the facts of this  
4       case, you may have to decide which testimony to  
5       believe and which testimony not to believe. You  
6       may believe everything a witness says or part of  
7       it or none of it. Proof of a fact does not  
8       necessarily depend on the number of witnesses who  
9       testify about it. In considering the testimony  
10      of any witness, you may take into account the  
11      following: Number one, the opportunity and  
12      ability of the witness to see or hear or know the  
13      things testified to; number two, the witness's  
14      memory; number three, the witness's manner while  
15      testifying; number four, the witness's interest  
16      in the outcome of the case and any bias or  
17      prejudice; number four, whether other evidence  
18      contradicts the witness's testimony; number six,  
19      the reasonableness of the witness's testimony in  
20      light of all the other evidence; and, number  
21      seven, any other factors that bear on the  
22      believability. The weight of the evidence as to  
23      a fact does not necessarily depend on the number  
24      of witnesses who testify about it.

25                   Now I want to say a few words

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1       about your conduct as jurors. First, you are not  
2       to discuss the case with anyone, including  
3       members of your family, people involved in the  
4       trial or anyone else. This includes, as I  
5       mentioned earlier during voir dire, discussing  
6       the case in Internet chat rooms, blogs, Internet  
7       bulletin boards or twitters or e-mails. Nor are  
8       you to permit others to discuss the case with  
9       you. If anyone approaches you and tries to talk  
10      with you about the case, please let me know about  
11      it immediately.

12                   Second, do not read any news  
13      stories or articles or listen to any news  
14      stories, articles, radio, television or online  
15      reports about the case or about anyone who has  
16      anything to do with it.

17                   Third, do not do any research  
18      such as consulting dictionaries, searches on the  
19      Internet or other materials. Do not make any  
20      investigation about the case on your own.

21                   Fourth, if you need to  
22      communicate to me, simply give a signed note to  
23      the bailiff to give to me.

24                   Fifth, do not make up your mind  
25      about what the verdict should be until after you



1 have gone to the jury room to decide the case and  
2 you and your fellow jurors have discussed the  
3 evidence. Keep an open mind until then.

4 Finally, until the case is given  
5 to you for deliberation and verdict, you're not  
6 to discuss the case with your fellow jurors.

7 During deliberation, you will  
8 have to make your decision based on what you  
9 recall about the evidence. You will not have a  
10 transcript of the trial. So I urge you to pay  
11 close attention to the testimony as it is given.  
12 If at any time you cannot hear or see the  
13 testimony, evidence, questions or arguments,  
14 please let me know immediately so I can correct  
15 the problem. As I said earlier, if you wish to  
16 move down to the front row, you certainly may do  
17 that.

18 If you wish, you may take notes  
19 to help you remember the evidence. If you do  
20 take notes -- are they in the jury room?

21 THE CLERK: We haven't gone in  
22 there yet.

23 THE COURT: They will provide you  
24 with tablets or pens or pencils. If you do take  
25 notes, keep them to yourself until you and your

1        fellow jurors go to the jury room to decide the  
2        case. Do not let note-taking distract you. When  
3        you leave for the day, or for lunch, your notes  
4        should be left in the courtroom here. No one  
5        will read your notes. And they will be destroyed  
6        at the conclusion of the case.

7                   Whether or not you take notes,  
8       you should rely on your memory of the evidence.  
9       Notes are only to assist your memory. You should  
10      not be overly influenced by your notes or those  
11      of your fellow jurors.

12 Now, the next phase of the trial  
13 will begin. Trials proceed in this way: First,  
14 each side may make an opening statement. An  
15 opening statement is made by the lawyers and is  
16 not evidence. It is simply an outline to help  
17 you understand what the party expects the  
18 evidence will show. A party is not required to  
19 make an opening statement.

20                   The plaintiff will then present  
21       evidence and counsel for the defendant may  
22       cross-examine. Then the defendant may present  
23       evidence and counsel for the plaintiff may  
24       cross-examine.

25 After the evidence has been

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1       presented to you, the attorneys will make closing  
2       arguments. I will then instruct you on the law  
3       that applies to the case. After that, you will  
4       go to the jury room to deliberate on your  
5       verdict.

6                       So we will now begin with the  
7       opening statements. And Mr. Heenan, do you wish  
8       to open for the plaintiff?

9                       MR. HEENAN: Yes, please, Your  
10      Honor.

11                      THE COURT: You may proceed.

12                      MR. HEENAN: Thank you, Your  
13      Honor.

14                      May it please the Court, counsel,  
15      ladies and gentlemen of the jury. In North  
16      Dakota, there is a regional debt collection firm  
17      called Johnson Rodenburg. Johnson Rodenburg has  
18      two offices, one in Bismarck and one in Fargo.  
19      From those offices in North Dakota, Johnson  
20      Rodenburg operates as a debt collector. As a  
21      typical debt collector, the employees at Johnson  
22      Rodenburg make phone calls to people, trying to  
23      collect debts. They write letters to people  
24      trying to collect debts.

25                      Johnson Rodenburg is also a law

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1        firm. It's owned by lawyers. It employs  
2        lawyers. Specifically, it employs lawyers who  
3        are admitted to practice law in the various  
4        states that it collects debts in. One of those  
5        states is Montana. Johnson Rodenburg has four  
6        lawyers who have sat for the Montana Bar and are  
7        admitted to practice law in the state of Montana.

8                        Johnson Rodenburg, as part of its  
9        collection activity business, uses the court  
10       system. What do I mean by, "uses the court  
11       system"? Johnson Rodenburg sues people; dozens a  
12       day, hundreds a month, thousands a year, in all  
13       of the states that it collects debts in.

14                      Why does Johnson Rodenburg use  
15       the court system? The court system has very  
16       powerful tools for people who are trying to  
17       collect money from someone else. Let me explain  
18       some of those tools.

19                      Once you get a judgement against  
20       someone, it's an automatic lien on the real  
21       property they own. So if a lawsuit is filed, a  
22       judgement is obtained. There's an automatic lien  
23       on the person's property. Once there's a  
24       judgement, Johnson Rodenburg is able to garnish  
25       wages, able to file paperwork with the court and

1 take a portion of the person's wages that they  
2 have sued. Johnson Rodenburg is able to submit  
3 people to what's called a debtor's examination,  
4 where the people they have sued are required to  
5 come into court and are given an oath, just like  
6 you ladies and gentlemen have done, and then they  
7 are examined about their personal finances,  
8 trying to uncover sources of collection.

9 Once there's a judgement, Johnson  
10 Rodenburg is able to attach that judgement to  
11 people's bank accounts. They can go in and what  
12 is called sweep the account, take the money out  
13 of it.

14 So who are all the people Johnson  
15 Rodenburg sues as part of its collection  
16 activity? I want to kind of explain. Johnson  
17 Rodenburg collects purchased debt. It's a  
18 specialized industry of the overall collection  
19 industry. It's call purchased debt industry.

20 Brad, if I could have that up?

21 I think everybody in voir dire  
22 said they have credit cards. Presumably we all  
23 have balances on that credit card.

24 Let's assume that a person  
25 doesn't make their payment. The credit card

1 company tries to collect. They will try to  
2 collect for months or even years. At some point,  
3 if they decide their efforts at collection aren't  
4 working, they are not getting the person to pay  
5 back the money, they will sell them to a company  
6 called a debt buyer.

7 The credit cards don't sell one  
8 account at a time. They sell them in batches,  
9 bundles. There are hundreds, sometimes  
10 thousands, sometimes tens of thousands, of people  
11 on these lists. And the debt buyers bid on and  
12 purchase these lists of old charged-off credit  
13 card debt. The debt buyers, as the evidence will  
14 show, purchase this debt for pennies on the  
15 dollar. The credit cards have been unable to  
16 collect it for months or years themselves, so  
17 they turn around and sell it to the debt buyers.

18 The debt buyers oftentimes get no  
19 more information than you would see on a  
20 spreadsheet or would fit on a sticky note;  
21 personal name, address, Social Security number,  
22 phone number, the amount of the charged-off debt,  
23 the interest rate. That's it. No documents.

24 The debt buyer in turn takes the  
25 spreadsheet information in those batches and

1 sends it to Johnson Rodenburg for collection.  
2 Johnson Rodenburg takes those people's names,  
3 addresses, Social Security numbers, the  
4 spreadsheet information, and puts together  
5 lawsuits with the information they need to fill  
6 in the blanks to sue people.

7 So Johnson Rodenburg files a  
8 lawsuit. They file the lawsuit for the face  
9 value of the credit card balance, not what the  
10 debt buyer paid for it. Johnson Rodenburg also  
11 adds interest. Johnson Rodenburg also adds fees,  
12 attorneys' fees, and then they sue people. And  
13 when they sue people, because Johnson Rodenburg  
14 are lawyers and they know the law, they know that  
15 the overwhelming majority of the people they sue  
16 aren't going to have lawyers, and they will win.

17 Subsequently Johnson Rodenburg  
18 gets a judgement against the people. Usually  
19 it's a rather fast process. They get a judgement  
20 for the face value of the debt plus whatever  
21 interest and fees they have tacked on. And once  
22 Johnson Rodenburg has that judgement, then they  
23 are able to use the tools of the legal system to  
24 collect from the person. And again, those tools,  
25 they are able to sweep people's bank accounts, go

1 in and take out whatever money is in there. They  
2 are able to garnish people's wages, file  
3 paperwork and get a portion of every paycheck  
4 they get and they are able to get a lien on their  
5 home.

6 So how does Johnson Rodenburg use  
7 the courts? I told you they file lawsuits. They  
8 file lots of lawsuits. They are lawyers, so that  
9 makes sense that they file lawsuits. Johnson  
10 Rodenburg's set up for quantity. They are set up  
11 for volume. You're going to hear that they are a  
12 factory that makes lawsuits, that makes  
13 judgements.

14 And how do they do that? Johnson  
15 Rodenburg uses a sophisticated computer program  
16 called Collection Master. Collection Master is  
17 able to interface with the debt buyers'  
18 computers, and I'm not going to do justice to the  
19 technology of how this works, but Johnson  
20 Rodenburg's Collection Master hooks up with the  
21 debt buyers' computers, they download the  
22 spreadsheet information about the people, and  
23 that gives them enough information to sue people.

24 Johnson Rodenburg employs a staff  
25 of non-lawyers who are able to crank out



1       lawsuits. You're going to hear that Johnson  
2       Rodenburg has one person full time, not an  
3       attorney, whose sole job it is to draft these  
4       Complaints for the lawyers at Johnson Rodenburg  
5       to sign and file.

6                       The overwhelming majority of the  
7       lawsuits Johnson Rodenburg files result in what  
8       is called default judgement --

9                       MR. SIMPSON: I object. I think  
10      this goes beyond the scope of the Court's  
11      pretrial ruling with respect to other litigation.

12                      THE COURT: Overruled.

13                      MR. HEENAN: What a default  
14      judgement is, you win because the other side  
15      doesn't show up. Just like in a basketball game  
16      when only one team shows up; when the other team  
17      doesn't show up, then the team that made it to  
18      the arena wins the game.

19                      That's how Johnson Rodenburg wins  
20      the overwhelming majority of its lawsuits is  
21      through default judgement. You will hear some of  
22      the reasons for why people don't respond. A lot  
23      of people are unable to respond. They are not  
24      familiar with the court system. They don't know  
25      how it works. They might have physical problems

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1       that prevent them from researching the law,  
2       finding out what you're supposed to do when you  
3       get sued.

4                       Of the small fraction of people  
5       that actually do respond to the lawsuits that  
6       Johnson Rodenburg files, a very, very, very small  
7       percentage of them appear through counsel. Most  
8       of the people are trying to represent themselves.  
9       And the logistics of it are such that Johnson  
10      Rodenburg knows they are not going to be able to  
11      get lawyers. When you're suing someone, for  
12      instance, Mr. McCullough who is sued for \$3800,  
13      you're going to be hard pressed to hire a lawyer  
14      who is able to defend your case and not charge  
15      you much more than the \$3800 you've been sued on.  
16      And Johnson Rodenburg knows that. Johnson  
17      Rodenburg knows how to win cases without having  
18      any evidence in its file to prove that the person  
19      owes anything.

20                      How can you win a case without  
21      evidence? Let me explain one way.

22                      Exhibit 4-2, please. One of the  
23      ways Johnson Rodenburg, when people do respond  
24      and they are trying to defend themselves and  
25      represent themselves, the judge will give them a

1 trial date. People assume, okay, I will show up  
2 at my trial. I will defend myself. Well, in the  
3 interim, Johnson Rodenburg sends out what are  
4 called requests for admissions. And requests for  
5 admissions are a tool that lawyers use in  
6 lawsuits to ask the other side to admit things  
7 that they think ought to be admitted, to  
8 basically carve out what is for dispute at trial  
9 and get rid of the stuff that everybody can agree  
10 should agree on.

11 Please blow up this portion.

12 THE COURT: Are all of the  
13 monitors working?

14 A JUROR: This one is not, 68.

15 THE COURT: Michael, can you  
16 check and see what the problem is there? Excuse  
17 me for interrupting.

18 Thank you, Michael.

19 You may proceed, Mr. Heenan.

20 MR. HEENAN: Thank you, Your  
21 Honor.

22 One of the tools that Johnson  
23 Rodenburg employs when the party they have sued  
24 is trying to defend themselves, they send out  
25 what are called requests for admissions. They

1 ask the person they have sued to admit certain  
2 things. And Johnson Rodenburg, in its requests  
3 for admissions, puts together this kind of  
4 detailed explanation of what a request for  
5 admission is. And it's largely what I've  
6 characterized as legal mumbo jumbo. Not  
7 contained anywhere in this language is the most  
8 important part. If you don't respond to a  
9 request for admission within 30 days, then it's  
10 considered admitted automatically and you lose.  
11 So they send out the requests for admission.  
12 They don't tell the people they have sent them  
13 to, who aren't lawyers, what happens if they  
14 don't respond within 30 days. They wait 30 days,  
15 if there is no response to these requests, then  
16 they will file paperwork with the judge and say,  
17 aha, we won. See, Judge, they admitted it.

18 That's the way, or one of the  
19 ways, Johnson Rodenburg wins lawsuits without  
20 having any evidence whatsoever in its own file.

21 Now, one of Johnson Rodenburg's  
22 biggest suppliers of people to sue is a company  
23 called CACV of Colorado. CACV is a debt buyer.  
24 They purchase the debts in bundle from the credit  
25 card companies for pennies on the dollars.

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1 Sometimes CACV gets information from the credit  
2 card companies, sometimes they don't. But when  
3 they get the spreadsheet, people's names,  
4 addresses, amount owed, they turn it over to  
5 Johnson Rodenburg for collection. And you're  
6 going to see, contained in one of the batches  
7 that CACV sent to Johnson Rodenburg in 2006 was  
8 my client, Timothy McCollough. CACV sent Johnson  
9 Rodenburg Mr. McCullough's name, his address, his  
10 Social Security number, his phone number, the  
11 amount they said he owed on a Chase Manhattan  
12 credit card, the interest rate and the date of  
13 last payment. Now, that was all, again,  
14 information that fits on a sticky note. No  
15 actual documents. What do I mean by documents?  
16 What do I mean by evidence? As you're going to  
17 hear, the actual credit card contract that the  
18 person has that applies to their credit card,  
19 that would be evidence that would prove what the  
20 person owes the debt, account statements showing  
21 that they use the card, when they used it, how  
22 much they charged on it. That would be evidence  
23 that the person owes the debt.

24 As you're going to hear, these  
25 accounts, when they get purchased by the debt

1 buyers, are cheaper the older they are. That's  
2 because of the statute of limitations. What that  
3 means is, sometimes an account becomes so old  
4 that you can't collect on it anymore. You can't  
5 sue someone for it because it's past the statute  
6 of limitations. When we talk about what evidence  
7 would be important for the statute of  
8 limitations, a payment receipt, some kind of a  
9 stub showing that someone made a payment so the  
10 person can see, okay, the person made a payment  
11 three or four years ago so we are within the  
12 statute of limitations. You're going to hear  
13 within Montana, the statute of limitations is  
14 five years, five years from the date of last  
15 payment.

16 So Mr. McCullough, as part of  
17 this batch from CACV, his name and that limited  
18 spreadsheet information was turned over to  
19 Johnson Rodenburg.

20 Exhibit 103, please. Now,  
21 there's a contract between this debt buyer CACV  
22 and Johnson Rodenburg about what Johnson  
23 Rodenburg's obligations are when they get these  
24 people's account information for collection.

25 Blow up this part here, please.

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1                   Let me explain a little bit.  
2       CACV doesn't actually have any employees. It's a  
3       subsidiary of a national debt collector called  
4       Collect America, Limited, and apparently there is  
5       some arrangement between Collect America, Limited  
6       and CACV as to who owns the actual accounts. CA,  
7       LTD is Collect America, the debt buyer. They  
8       forward to local counsel, which here is Johnson  
9       Rodenburg, an offer: Will you sue the person for  
10      us? And go on to page two, please. And they  
11      tell Johnson Rodenburg, When you get the file,  
12      when you get the information that we have, you as  
13      lawyers assess the completeness of that  
14      information and the materials and then let us  
15      know whether you want any additional materials or  
16      information.

17                   In this case, Johnson Rodenburg  
18      didn't request anything about Mr. McCullough.  
19      They didn't ask for a contract that applied to  
20      him. They didn't ask for any account statements  
21      showing when or if he even used this credit card.  
22      They didn't request any documentation showing  
23      when he would have stopped paying on the credit  
24      card, if he even used it. They didn't request  
25      any information as to who even owned this credit

1 card. They asked for no more information.

2 And then Exhibit 67, please.

3 So Collect America offered to  
4 place Mr. McCullough's account. Pull up that  
5 part, please. Top part. They told Johnson  
6 Rodenburg the original creditor was Chase  
7 Manhattan, the debtor's name was Tim McCullough,  
8 type of debt, credit cards. Take that down,  
9 please, and blow up this bottom part.

10 Now, remember, Collect America  
11 wasn't Mr. McCullough's credit card company.  
12 They are nobody's credit card company. They have  
13 no firsthand knowledge of how these people use  
14 credit cards, how much they use the credit cards  
15 for, they have no firsthand knowledge. So  
16 Collect America tells Johnson Rodenburg, We make  
17 no warranty as to the accuracy or validity of the  
18 information we provide, and no warranty made  
19 concerning the collectability. It's kind of like  
20 a quick claim. Like in real estate, you don't  
21 sell the person the house. You just agree that  
22 you don't own it. What they are saying is, We  
23 make no representations. That's up to you,  
24 Johnson Rodenburg, as collectors and lawyers.  
25 You need to do your own investigation.

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1                   So they send off Mr. McCullough's  
2     account. They provide no information whatsoever.  
3     They tell Johnson Rodenburg, Don't rely on what  
4     we are telling you. You have an obligation  
5     independently to make sure it's appropriate to  
6     sue this person.

7                   Johnson Rodenburg, as you will  
8     hear, makes no independent effort to verify that  
9     it's legally appropriate to sue Mr. McCullough.  
10    They don't request information from the credit  
11    card company. They don't request information  
12    even from their own client saying, Hey, do you  
13    have anything more you can give us, any evidence  
14    that we might need to show a judge after we sue  
15    the person to show that he owes the debt? They  
16    don't ask for any of that. They just sue Mr.  
17    McCullough.

18                  Exhibit 2-1, please. When  
19    Johnson Rodenburg sues Mr. McCullough, they  
20    demand \$3800 -- let me back up. When they sue  
21    Mr. McCullough, it was past the statute of  
22    limitations. It was in violation of Montana law  
23    for them to sue him at that point. That's not  
24    going to be an issue for you to decide.

25                  Johnson Rodenburg not only sued

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1 Mr. McCullough for the face value of the credit  
2 card, \$3800, but then they also tacked on \$5500  
3 in interest and approximately \$500 in attorneys'  
4 fees.

5 As you're going to hear, in  
6 Montana, unless you have a contract that gives  
7 you the right to claim attorneys' fees, it's  
8 illegal to demand them. And Johnson Rodenburg  
9 didn't have any contract, didn't have any  
10 contractual right to claim attorneys' fees, yet  
11 they tacked them on anyway and asked for about  
12 \$500.

13 Now, remember that Johnson  
14 Rodenburg doesn't know anything about the people  
15 that it sues. These people in these batches,  
16 they just file these lawsuits and collect  
17 judgements and collect the judgements. They  
18 don't know whether someone is a farmer, whether  
19 they are a single mother, whether they are a  
20 widower, unable to work, they don't know or care  
21 to know the people's stories or circumstances.  
22 So when they sued Mr. McCullough, they didn't  
23 know anything about him.

24 Here's what Johnson Rodenburg  
25 would have found out if they bothered to ask what

1        was going on with Mr. McCullough. Tim was a  
2        custodian here in the Billings School District.  
3        He worked out at the vo-tech. In May of 1990, he  
4        was cleaning one evening and he was struck in the  
5        head by an intruder.

6                        After Mr. McCullough was struck  
7        in the head, he had all sorts of mental problems.  
8        He was diagnosed with posttraumatic stress  
9        syndrome. He was diagnosed with stress disorder,  
10       anxiety disorder. He has terrible migraines all  
11       the time. He rarely leaves his house, by choice,  
12       because he can't deal with any stress whatsoever.  
13       And Johnson Rodenburg didn't know that and they  
14       didn't care to know that. So when Johnson  
15       Rodenburg sued Mr. McCullough, they had no idea  
16       what was going to happen when they employed a  
17       process server, a deputy sheriff, to come out to  
18       Mr. McCullough's house and hand him a Complaint  
19       and say, You've just been served. You've just  
20       been sued.

21                      Let me tell you what else Johnson  
22       Rodenburg didn't know because they didn't bother  
23       to conduct an investigation. The CACV had  
24       already sued Mr. McCullough two years previously  
25       through a different law firm. They sued Mr.

1 McCullough. He defended himself, or tried to,  
2 and just before trial CACV dismissed the case.  
3 And Mr. McCullough hadn't gotten the dismissal  
4 paperwork in the mail before he gets a letter  
5 from another debt collection law firm saying, You  
6 owe this money. When are you going to pay this  
7 money?

8 Mr. McCullough writes a letter  
9 back to this debt collection law firm. He says,  
10 I already got sued, the case got dismissed,  
11 please leave me alone. It's the last he hears  
12 from that debt collection law firm but it's not  
13 the last he hears from this account.

14 Then he gets hit from a second  
15 law firm from Johnson Rodenburg who is the third  
16 law firm assigned to this account trying to  
17 collect the same old debt. And Tim, despite his  
18 mental condition, despite his problems, he knows  
19 that he needs to respond. He knows he needs to  
20 defend himself. So he goes down to the  
21 courthouse and files an answer.

22 Please bring up his answer.

23 Here's what he writes: Forgive  
24 my spelling. I have a head injury. Writing does  
25 not come easy. The statute of limitations is up.

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1 I have not had any dealings with any credit cards  
2 in well over eight and a half years. I am  
3 disabled. I get \$736 a month from Social  
4 Security. My mortgage is \$724 a month. I'm now  
5 a diabetic. I have no money, no insurance but  
6 Medicare.

7 Next page, please.

8 When workman's comp stopped  
9 paying, I ran out of money. Chase would not work  
10 with me. They passed it on to debt collectors.  
11 They lied to me, insulted me, used bad language.  
12 They called around the clock so I could not rest.  
13 They got me so wound up and confused the healing  
14 of my head injury stopped. They were hurting me  
15 so I had to stop dealing with them so I could  
16 recover. I'm still recovering. The pain they  
17 caused and the new medical bills are worth more  
18 than the money they want. This is the third time  
19 they brought me to court on this account. The  
20 first two times with Judge Hernandez. When will  
21 it stop? Do I have to sue them so I can live  
22 quietly in pain?

23 So Mr. McCullough files his  
24 answer, sends it to Johnson Rodenburg. Johnson  
25 Rodenburg lawyers look at his answer and don't do

1 anything about it. They do not follow up. They  
2 don't say, Hey, this guy says he is on Social  
3 Security disability and we are never going to be  
4 able to collect Social Security disability  
5 payments under the law. They don't do any  
6 follow-up on that. Is he really on Social  
7 Security disability? If they would have done  
8 some follow-up, they would have found, yeah, he  
9 is on Social Security disability. He's been on  
10 disability since the head injury back in 1990.  
11 Johnson Rodenburg doesn't follow up and say, hey  
12 what is this guy talking about statute of  
13 limitations? Maybe we should get this  
14 documentation. They didn't do any of that.

15 THE COURT: Two minutes, counsel.

16 MR. HEENAN: Thank you, Your  
17 Honor.

18 And they certainly don't drop the  
19 case.

20 I'm going to speed things up a  
21 little bit here. So not only do they not drop  
22 the case, they continue to pursue it. They send  
23 him these requests for admissions that we just  
24 looked at and talked about. They are trying to  
25 win anyway.

1 CACV, their client, sent them an  
2 e-mail and said, We made an mistake. They say,  
3 We made a mistake. We told you he made a payment  
4 in 2004. Actually that was wrong. That was  
5 costs or unused costs.

6 So their own client is saying, We  
7 made a mistake.

8 Johnson Rodenburg doesn't drop  
9 the case. They are pushing it. They send him  
10 these requests for admission. Tim comes to me.  
11 He shows me the information. He hires a lawyer.  
12 I make an appearance in the case and immediately  
13 Johnson Rodenburg dismisses it.

14 And as you're going to see, and I  
15 won't have time to show you now, internally the  
16 Johnson Rodenburg lawyers sent an e-mail to the  
17 effect of, oh, shoot, we got caught. There's a  
18 lawyer on the other side. We need evidence. We  
19 need documents. CACV writes back and says, We  
20 told you, there is no evidence, no documents  
21 about this guy.

22 Now, let me explain, given the  
23 short length of time. We went through a process,  
24 prior to you ladies and gentlemen coming here for  
25 trial, called summary judgement and we presented

1 to Her Honor the facts, as you're going to hear  
2 in the trial, and she made certain rulings. And  
3 she found that Johnson Rodenburg violated the  
4 federal Fair Debt Collection Practices Act four  
5 different ways by suing Mr. McCullough on a  
6 time-barred debt which was illegal to bring, by  
7 continuing to process the time-barred debt even  
8 though their own client gave them information  
9 showing it was time-barred, and by trying to  
10 collect on attorneys' fees which were  
11 inappropriate to collect under Montana law, and  
12 by using this request for admission form which  
13 Her Honor found to be unfair and deceptive and a  
14 violation of the federal law.

15 So why are we here? Because  
16 Johnson Rodenburg's also a lawyer. They are a  
17 law firm. And they are required to play by the  
18 rules of law they have to play by in Montana. So  
19 we are going to put on evidence to show you that  
20 they did not follow the rules here, with Mr.  
21 McCullough or as a business practice in the  
22 people they are suing in this state.

23 Number two, based on the judge's  
24 findings, the judge's rulings that this law firm  
25 broke the law, you're going to be asked to award



1       some damages. We will explain to you the nature  
2       of those damages. One of them is going to be  
3       punitive damages, damages to punish this law firm  
4       for the conduct towards Mr. McCullough and in the  
5       context of the business practice in the state of  
6       Montana and all the lawsuits they are filing  
7       against people in the state of Montana.

8                       The one lawyer that sued Mr.  
9       McCullough, as you're going to hear, he sues  
10       approximately 2,000 people a year.

11                      THE COURT: That's time, Counsel.

12                      MR. HEENAN: Thank you, Your  
13       Honor.

14                      THE COURT: You may open for the  
15       defendant.

16                      MR. SIMPSON: Thank you, Your  
17       Honor.

18                      Good morning. You're all sitting  
19       in the back, no doubt, to be as far away from the  
20       lawyers as possible.

21                      I tend to speak a little softly  
22       at times, so hopefully the microphone will allow  
23       you to hear me. If you have trouble hearing me,  
24       please raise you're hand and I will speak up.

25                      So who is my client? You have

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1       heard a little bit about them, but you only heard  
2       one side of the story. There is Lisa Lauinger.  
3       She is a partner at the Johnson, Rodenburg &  
4       Lauinger firm. Her office is in Bismarck. She  
5       has a small office there with three other  
6       attorneys, and you will meet tomorrow or the next  
7       day Charles Dendy, who is the other attorney who  
8       worked with her on this file in this  
9       debt-collection matter against Mr. McCullough.

10                       But they are a law firm just like  
11       any other. They have an emphasis, as many  
12       lawyers do, and their emphasis is on protecting  
13       the rights of creditors, people who are owed  
14       money from other people. That's what Lisa and  
15       Charlie and the other folks in their firm  
16       specialize in. We will hear more about that when  
17       Lisa and Charlie testify, but that's their area  
18       of practice.

19                       As you heard Mr. McCullough's  
20       counsel say in opening, this is a law firm, but  
21       we want you to know these people. They are doing  
22       their job. They are representing a client, just  
23       like I'm representing a client and Mr. Heenan is  
24       representing a client.

25                       So let's talk about what they did

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1 in this case and what really happened here. You  
2 heard part of the story, but there is quite a bit  
3 more. In this case, my client, Johnson,  
4 Rodenburg & Lauinger, represented a company  
5 called CACV of Colorado.

6 Now, CACV, as you heard, is a  
7 company that buys debts. In this case it bought  
8 a debt that Mr. McCullough owed on his Chase  
9 Manhattan credit card account. CACV bought that  
10 from Chase Manhattan and they eventually sent the  
11 file to my client, and they said, "Would you  
12 please try to collect on this debt?" And they  
13 said, "Chase Manhattan was owed money by Mr.  
14 McCullough. We have the right to get the  
15 payments that Mr. McCullough owes. So please try  
16 to collect on that for us."

17 The first thing or one of the  
18 things you will see today, I believe, is  
19 testimony from a witness named Bobby Dunker. Mr.  
20 Dunker is an agent of CACV. He's located at  
21 their office in Denver. Since he wasn't able to  
22 travel here for trial, we had to go to his office  
23 or offices in Denver, and we have his testimony  
24 by videotape. So you will get that played on the  
25 screens in front of you.

1                   Mr. Dunker has some important  
2     testimony to offer in this case. He will  
3     confirm, of course, that CACV hired my client in  
4     about December of 2006 or January of 2007 to work  
5     representing CACV in the matter against Mr.  
6     McCullough, and that in fact CACV expected that  
7     Johnson Rodenburg, as its lawyer, would pursue  
8     its interest in an attempt to collect the debt by  
9     filing a lawsuit, unless there was some reason  
10    not to. And he will testify that when the matter  
11    was referred to Johnson, Rodenburg & Lauinger, he  
12    wasn't aware of any reason why Johnson, Rodenburg  
13    & Lauinger shouldn't file a lawsuit.

14                  Why is that important? It's  
15    important because in this case Mr. Dunker will  
16    testify that CACV has a vested interest in  
17    assuring that when it sent a file to one of its  
18    lawyers it makes sure it gets the date of the  
19    last payment correct because that's the date that  
20    starts the statute of limitations running.

21                  We heard a little bit earlier on  
22    voir dire about statute of limitations, what it  
23    is. It's simply the length of time the law gives  
24    a party to file a lawsuit after whatever it is  
25    that occurs that leads to the lawsuit.

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1                   In this case we know on a credit  
2     card act it's a five-year period from the date of  
3     the last payment. CACV knows it's important  
4     because it doesn't want to be a party, a party  
5     plaintiff, to a lawsuit if the lawsuit is filed  
6     beyond the statute of limitations. So CACV,  
7     according to Mr. Dunker, makes every effort to  
8     ensure that the information it provides its  
9     lawyers is correct, including the date of the  
10    last payment.

11                   You'll hear from Mr. Dendy,  
12    Charles Dendy, that the file was transmitted from  
13    CACV to Johnson Rodenburg in electronic form so  
14    it's just over the computer. It's sent over the  
15    Internet. They get the information and it  
16    downloads into their system. And the people at  
17    Johnson Rodenburg's office can look at the  
18    computer screen and they can tell, well, we know  
19    who the debtor is. We know who Mr. McCullough  
20    is. We know what his address is. We know that  
21    he had this debt to Chase Manhattan Bank. Here  
22    is the account number, the amount of the debt.  
23    And, guess what? It has the date he made the  
24    last payment. That is one of the things that  
25    pops up on the screen. We know that's an

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1 important date.

2 So what happens? Well, the file  
3 is sent and -- if you could bring up 501, please.  
4 If I could highlight the paragraph in the middle.

5 Now, this is a letter from Grace  
6 Lauinger. She happens to be not only Lisa's  
7 mother but she, at the time, was an account  
8 manager at the office in Bismarck. And when the  
9 file was received, they took a look at the  
10 information in the file, including the  
11 information about the date of the last payment.  
12 And they said, Hey, you know, we got the file,  
13 and it looks like the statute of limitations on  
14 this claim against Mr. McCullough has already  
15 expired. It's right here in print. We received  
16 this file and it appears the statute of  
17 limitations expired on this file as of August 21,  
18 2005. If you can provide us with an instrument  
19 in writing, we may be able to extend the statute  
20 of limitations. Thank you.

21 That's dated January 4, 2007. So  
22 within a week or two of the time that my clients  
23 received the file, they already spotted the  
24 problem.

25 What do they do? Like any other

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1 lawyer, they go back to the client with this  
2 letter and say, Hey, what's going on here?

3 Pull up 502, please. CACV writes  
4 back -- if you could just highlight the lower  
5 part. We don't need the top part there. There  
6 we go.

7 This is from Jeffrey Guston at  
8 CACV and it's an e-mail to Lisa, and it's dated,  
9 as you can see at the top, January 23, 2007. And  
10 here it is about Mr. McCullough's account. This  
11 debtor, referencing Mr. McCullough, made a June  
12 30, 2004 PD, and that stands for postdated check  
13 payment, for \$75,000.

14 THE COURT: I think you misread  
15 that.

16 MR. SIMPSON: \$75 -- if it was  
17 75,000, we wouldn't be here today -- do you need  
18 any of this info from me on this one?

19 There it is right there. There  
20 is the client response. My client has not  
21 gotten, as it was suggested to you earlier, no  
22 information. My client is looking at the file  
23 and it's going to its client and saying, We need  
24 more information. It looks like this is beyond  
25 the statute of limitations.

1                   You could bring up Exhibit 7,  
2     page two. This is Plaintiff's Exhibit 7, page  
3     two, and if you go down to the entry, right  
4     there.

5                   This is a copy of some file notes  
6     from Johnson, Rodenburg & Lauinger's file system.  
7     And this note logs a reference by a person at  
8     CACV, and we can tell that. It says EVI over in  
9     the corner, and that means it's been typed in by  
10    someone who doesn't work at Johnson, Rodenburg &  
11    Lauinger. And it says, E-mailed Lisa. Statute  
12    of limitations not expired due to the postdated  
13    check made to us. Please continue suit.

14                  So here it is. Not only do we  
15    have the e-mail but we have this electronic file  
16    entry, the statute of limitations isn't expired  
17    due to this check sent to us June 30, 2004.  
18    Let's move the suit along.

19                  What's next?

20                  Bring up 504, please. Highlight  
21    the text in the third paragraph.

22                  This is a letter dated February  
23    8, 2007. It's actually a letter that Lisa  
24    drafted, and Grace, as the account manager,  
25    signed it. This is a letter to Mr. McCullough.

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1 This is my client's first contact with Mr.  
2 McCullough. And I don't know if you want to  
3 refer to this as a demand letter or what you want  
4 to call it, but it's essentially a notice to Mr.  
5 McCullough saying, Hey, we have been hired to  
6 attempt to collect the debt that you owe to Chase  
7 Manhattan Bank. If you made payments, let us  
8 know. If you dispute the validity of all or any  
9 portion of this debt, you must notify this office  
10 within 30 days of receipt of the notice or we  
11 will assume the debt is valid. If you notify us  
12 within writing within 30 days of receipt of this  
13 notice, we will obtain information from the  
14 creditor and mail you a copy.

15 Mr. McCullough will testify he  
16 doesn't dispute that he got this letter. He  
17 can't remember if he saw this exact one or not,  
18 but you will hear from my client this was the  
19 letter that was sent. It didn't come back and  
20 Mr. McCullough received the letter and he didn't  
21 do anything. He didn't call my client. He  
22 didn't write. He didn't say, Hey, I dispute this  
23 debt. Send me some proof. I think you're beyond  
24 the statute.

25 He put the letter in the round

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1 file. The letter goes out February 8, 2007.  
2 Nothing happens. 30 days go by. Well, my client  
3 has a client, CACV, and they are expecting to  
4 file a suit so in fact they do.

5 This is Exhibit 2. Here it is.  
6 This is the offending document, if you will. My  
7 client sets forth what it's seeking on behalf of  
8 its client, CACV of Colorado. It says, Hey, we  
9 want the amount of money that you owed on your  
10 Chase Manhattan credit card account. We want  
11 costs and attorneys' fees. There it is. That's  
12 it.

13 You will hear from Charlie Dendy.  
14 I think I told you this earlier. And he will  
15 tell you what he did before filing the suit and  
16 before he signed the complaint. Other people in  
17 the office who are not lawyers helped draft this,  
18 but when it comes down to it, Charlie and Lisa as  
19 the lawyers are responsible for what goes into  
20 this. They recognize that. It's their  
21 obligation to the court system, their ethical  
22 responsibility of what is going in here.

23 They double-check the file.  
24 Charlie will tell you he always checks the  
25 information in its file, in the company's

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1       electronic file. And one of the things he always  
2       looks for is the date of the last payment because  
3       he wants to make sure that he doesn't file a  
4       lawsuit outside the statute of limitations. He  
5       knows that is a big no-no and he doesn't want to  
6       do that.

7                   We already know that the  
8       information that CACV gave to the firm was wrong.  
9       So, as we have heard earlier, if you rely on bad  
10      information, mistakes can be made.

11 Well, the lawsuit is filed and  
12 it's dated April 17, 2007. It's served on Mr.  
13 McCullough not long thereafter. Nothing happens  
14 for the next couple of months until Mr.  
15 McCullough files an answer.

16 If you can bring that up, please.

17 That is Exhibit 3.

18                   Mr. McCullough goes down to the  
19       courthouse and files the answer. He mentions the  
20       statute of limitations. He also mentions that  
21       Chase would not work with him and they passed it  
22       on to collectors that lied to him, insulted him,  
23       used bad language and called him around the  
24       clock. You will hear from Mr. McCullough.

25                    That's not my client.   Johnson

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1 Rodenburg didn't lie to him. They didn't use  
2 vulgarity. They didn't threaten him. In fact,  
3 they didn't hear from him. He didn't call them.  
4 He didn't write to them. He didn't explain that  
5 he had a problem with this debt until the very  
6 first thing that he files is this answer.

7 Again, we have a little bit of a  
8 lull. My client has other files to work on, as  
9 in every case. But eventually, in October,  
10 Charlie decides he needs to get the file moving.  
11 He has dates he has to work within within the  
12 court system. So he sends out interrogatories,  
13 which are written questions, and he sends out  
14 requests for admission.

15 You've already seen some of those  
16 displayed up on the screen. That's a process  
17 that is used in every lawsuit. Lawyers want to  
18 find out what does the other side know, what is  
19 the other side contending in the case.

20 We swapped them in this case.  
21 You may even see some of the interrogatories and  
22 requests for admission that we exchanged. It's  
23 part of the court process.

24 So Mr. Dendy does that in this  
25 case. He sends interrogatories to Mr.

1 McCullough. And he sends requests for admission.

2 Well, about this time, Mr.

3 McCullough decides he's not going to represent

4 himself anymore so he hires Mr. Heenan. Mr.

5 Heenan answers the discovery. He serves answers

6 to the interrogatories and he serves answers to

7 the requests for admissions.

8 He told you a little bit in his

9 opening about how if more than 30 days go by and

10 you don't respond to the requests for admission

11 that is somehow going to cause you to lose the

12 lawsuit.

13 That didn't happen here. Mr.

14 McCullough got a lawyer and answered the requests

15 for admission, denied the ones he wanted to deny

16 and answered the interrogatories the way he

17 wanted to answer.

18 A short while later, we are up to

19 December 7, 2007.

20 Bring up Exhibit 7, page seven,

21 please.

22 Charlie is having a discussion

23 with his client representative, if you will,

24 Collect America, a woman named Leslie Smith.

25 This is, again, we are referring to Johnson

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1 Rodenburg's electronic file notes. He has  
2 documented -- you can tell. That's his initials  
3 over in the left-hand column -- Lesley called,  
4 said need to dismiss as soon as possible. Have  
5 statute-of-limitations problem. Said last  
6 payment was in 2000, not in 2003 as we thought.  
7 She had to ask -- looks like supervisor -- as  
8 last was showing same statute of limitations we  
9 are. Supervisor said what shows as last pay was  
10 not, was just costs being returned to someone.  
11 Actual last pay date was 2000.

12 This is the time that Charlie  
13 gets it in his head, oops, we have a problem.

14 So what happens? Charlie calls  
15 Mr. McCullough's attorney, Mr. Heenan. "We have  
16 got a problem. It's beyond the statute of  
17 limitations. We are going to dismiss the  
18 lawsuit."

19 Well, there is no objection.  
20 This is the Order of Dismissal of Prejudice, and  
21 this was signed by Judge Watters. This is in the  
22 court case that Johnson Rodenburg filed on behalf  
23 of its client against Mr. McCullough. It's  
24 dismissed with prejudice, which means nobody can  
25 ever file this lawsuit on this credit card debt

1       again against Mr. McCullough.

2                       What does it mean? It means Mr.  
3       McCullough walks away without having paid his  
4       credit card debt. That's it. It's done. The  
5       case is over.

6                       Now, you're going to hear that  
7       midway through the handling of this case, in  
8       about August of 2007, Grace Lauinger exchanged  
9       some e-mails with Bobby Dunker at the CACV office  
10      in Denver. In one of those e-mails, a very brief  
11      snippet says, By the way, June 30, 2004 payment  
12      that we were relying on was actually return of  
13      unused costs. It wasn't a payment by Mr.  
14      McCullough.

15                      Well, Grace puts it in the file  
16      and, as we all do, Charlie overlooked it. He  
17      will tell you that he overlooked it. He had no  
18      reason, he had no reason, to hide that. He had  
19      no reason to do anything other than act on it as  
20      he saw. But as you've just seen, he didn't know  
21      about the problem until December.

22                      So was it a mistake? Should he  
23      have done it? No. Did he mean to do it? Did he  
24      mean to continue the lawsuit after he got that  
25      information? No way. He had no reason to do so.

1       There was absolutely nothing malicious about it.  
2       You will hear Charlie testify about that. It was  
3       simply an oversight.

4                       You will also hear there was a  
5       claim for attorneys' fees included in the  
6       Complaint. You've seen the Complaint. There was  
7       one line that says, Please give us attorneys'  
8       fees of \$481. Charlie will tell you that he did  
9       that because the Chase Manhattan credit card  
10      agreements that he saw, and he's seen a number of  
11      them, always contain a clause that says, If we  
12      have to sue you, Mr. Credit Card User, because  
13      you don't pay your debt, and we win, we get our  
14      attorneys' fees back.

15                     In that situation, that's  
16      permissible under Montana law. Charlie did not  
17      have the card member agreement in his file when  
18      he filed the lawsuit. Should he have had it?  
19      Yep. But you know what? It's in every one that  
20      he's seen.

21                     And Mr. Dunker, from CACV, will  
22      testify to the same thing. To his knowledge,  
23      Chase Manhattan credit card card member  
24      agreements, which are a written contract, provide  
25      for award of attorneys' fees. Well, he should



1 have had it in his file at the outset, but you  
2 know what? He didn't. It was a mistake.

3 Now, I want to talk to you for  
4 just a minute about Mr. McCullough's claim of  
5 damages. He says in this case that he was  
6 emotionally distressed because of the way my  
7 client treated him by filing a lawsuit against  
8 him. And I think what you'll hear is that Mr.  
9 McCullough was no more distressed than anybody  
10 else who has a lawsuit filed and served against  
11 them.

12 You're probably going to hear  
13 that Mr. McCullough has a longstanding history of  
14 mental illness. We don't bring that up to make  
15 light of his situation, but it's important  
16 because when the claim is one of emotional  
17 distress, you as the jury need to know what his  
18 condition is beforehand so you can assess that  
19 against what it is now.

20 In fact, you may hear from one or  
21 two psychologists that evaluated Mr. McCullough  
22 during the course of this case. Each side,  
23 actually, hired a psychologist to evaluate Mr.  
24 McCullough. The plaintiff hired Dr. Veraldi and  
25 we asked Dr. Joseph McElhinney, who is a

1       psychologist in town, to conduct an evaluation.

2                       What you will hear from Dr.

3       McElhinney is he looked at Mr. McCullough's  
4       medical records from past psychiatric treatment.

5       He asked Mr. McCullough to complete a set of  
6       written psychological tests, which he did, and  
7       then he spent some time in an interview format  
8       where he got to ask Mr. McCullough questions.

9       And you're going to hear from Dr. McElhinney that  
10      while Mr. McCullough has had some mental illness  
11      over the year it's his professional opinion that  
12      Mr. McCullough is not suffering from any kind of  
13      emotional distress because of the lawsuit that  
14      was filed against him.

15                    You will hear from Mr. McCullough  
16      in fact that if he was emotionally distressed he  
17      didn't do anything about it. He didn't seek any  
18      medical help. He didn't alter his daily routine.  
19      In fact, he kept on about life as it had been  
20      before.

21                    One thing I want you to keep in  
22      mind here, I'm almost done, but as the judge has  
23      I think already told you, the plaintiff has the  
24      burden of proof. It's just a fancy legal term  
25      meaning, he's the one coming in asking for

1 relief. It's his burden to persuade you that the  
2 evidence is in his favor. Because of that, that  
3 means he gets to go first at each stage at the  
4 trial. He got to go first in the voir dire. He  
5 was first in the opening. He gets to go first  
6 calling his witnesses.

7 I think it might be human nature  
8 to kind of give the guy who goes first, you get  
9 that information in your mind and think, that's  
10 got to be right. We get to put on our side of  
11 the story too, and I ask you not to make up your  
12 mind until you hear from us as well. Because  
13 there is evidence from both sides of the case.  
14 So please keep an open mind until you hear from  
15 us as well.

16 My client and I very much  
17 appreciate your time serving here as jurors. We  
18 know you all have things you would rather be  
19 doing, spending time with friends, family,  
20 working, things of that nature. But since you  
21 are here, I promise you we will do our best to  
22 put our witnesses on in a prompt manner and get  
23 the questions asked that you need to answer the  
24 questions in this case. Thank you very much.

25 THE COURT: You've heard the

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1 opening statements of the attorneys. It's almost  
2 noon so we will take our lunch break now and we  
3 will return here at 1:30 and the plaintiff will  
4 then begin presenting the evidence that he wishes  
5 you to consider.

6 We are about to take the first  
7 recess during the trial itself. Before doing  
8 that, I want to remind you about your conduct as  
9 jurors. I read you an instruction earlier about  
10 it. I'm going to remind you of it now. I won't,  
11 every time we take a recess, read you each of the  
12 admonitions, but I will remind you of them  
13 because it's very important that you follow them.

14 So do not discuss this case with  
15 anyone. Do not permit others to discuss the case  
16 with you. If anyone approaches you and tries to  
17 talk to you about the case, let me know about  
18 that immediately. Do not read any news stories  
19 or articles or listen to any news stories,  
20 articles, radio, television or online reports  
21 about the case or about anyone who has anything  
22 to do with it. Do not do any research or make  
23 any investigation about the case. If you need to  
24 communicate with me about anything, simply give a  
25 signed note to the bailiff or the clerk to give

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1 to me.

2 Do not make up your mind about  
3 what the verdict should be until after you've  
4 gone to the jury room to decide the case and you  
5 and your fellow jurors have discussed the  
6 evidence. Keep an open mind until then.

7 Finally, until the case is given  
8 to you for your deliberation and verdict, do not  
9 discuss the case with your fellow jurors.

10 We will be in recess until 1:30  
11 and resume with the evidence at that time.

12 (Lunch recess.)

13 THE COURT: I understand the  
14 parties wish to discuss something.

15 MR. HEENAN: Yes. Plaintiff  
16 desires to introduce discovery responses from  
17 Johnson Rodenburg and then have Instruction  
18 Number 14 given to the jury. It's my  
19 understanding the defendant objects to that.

20 THE COURT: What's the nature of  
21 the objection?

22 MR. SIMPSON: They need to come  
23 in through a witness, Your Honor.

24 THE COURT: May I see them,  
25 please?

1 MR. HEENAN: Yes, Your Honor.

2 THE COURT: So we are talking  
3 about two requests for admission and one  
4 interrogatory?

5 MR. HEENAN: Yes, Your Honor.

6 THE COURT: What is your  
7 authority that they have to come in through a  
8 witness? Aren't these sworn by the defendant as  
9 discovery responses are obligated to be?

10 MR. SIMPSON: The  
11 interrogatories, I believe, are.

12 THE COURT: And so aren't they an  
13 admission? Why wouldn't the party be able to  
14 just read them to the jury?

15 MR. SIMPSON: I don't have any  
16 authority, Your Honor.

17 THE COURT: All right.

18 MR. HEENAN: I do think it's  
19 appropriate to give Instruction Number 14, Your  
20 Honor.

21 THE COURT: Is that one of the  
22 ones that we gave as a preliminary instruction?

23 MR. HEENAN: It is, Your Honor.

24 THE COURT: I thought so. These  
25 are ones that I give if it becomes appropriate,

1       which, if you intend to read these, it would be.

2                   MR. HEENAN:   I do.

3                   THE COURT:   Is there any  
4       objection to Instruction Number 14, which has  
5       previously been given to the party?

6                   MR. SIMPSON:   No.

7                   MR. BOHYER:   So long as it's read  
8       to the jury, Your Honor, it's not an exhibit.  So  
9       in terms of publishing it to the jury, I assume  
10      you don't mean to put it up on the screen and  
11      they get to look at it during examination.  It's  
12      not an exhibit.

13                  MR. HEENAN:   I think I get to  
14      publish it, but I'm not going to move it into  
15      evidence.  But I think the jury is allowed to  
16      read it on the screen as I read it to them.

17                  THE COURT:   No, I think you  
18      should read it to them.

19                  MR. SIMPSON:   For clarification,  
20      my understanding is there is no additional  
21      comment.  Rather, Mr. Heenan will read the  
22      questions and answers, and that's it.

23                  THE COURT:   Correct.

24                  MR. HEENAN:   Correct.  Same  
25      practice with exhibits that have been admitted

1       into evidence. It's my understanding I'm allowed  
2       to publish them for the jury by reading them to  
3       them. I don't need to put a witness in to show  
4       the jury an exhibit that's been admitted.

5                   THE COURT: Unless there's a  
6       foundation objection of some kind.

7                   MR. BOHYER: The problem is it  
8       turns into another opening statement. If we are  
9       just going to set up one exhibit after another  
10      and read them, if there are witnesses here with  
11      respect to say, yes, that is the document, even  
12      though the Court admitted it, it doesn't change  
13      the procedure of the trial.

14                  THE COURT: That's correct. But  
15      these discovery responses are not exhibits.

16                  MR. BOHYER: Correct. He has  
17      switched gears there and started talking about  
18      exhibits.

19                  MR. HEENAN: Let me explain.

20                  THE COURT: You're not allowed to  
21      testify about exhibits.

22                  MR. HEENAN: Not at all. For  
23      example, when we show Mr. Dendy's video, he  
24      references an exhibit that is already admitted  
25      into evidence. So when we turn off his video, I



1 would like to read or publish for the jury -- I  
2 don't know that I even want to read it. I just  
3 want to show the jury what the exhibit is that  
4 has been admitted.

5 THE COURT: No, you can show the  
6 video, and that's it. You can't testify about  
7 documents or give documents. You have to do that  
8 through witnesses.

9 MR. HEENAN: I can't just show  
10 the jury the exhibits that's been admitted  
11 without any commentary on it? Just put it up on  
12 the screen and let them read it before I move on  
13 to my next witness?

14 THE COURT: Is there any  
15 objection? I think it would increase jury  
16 understanding.

17 MR. BOHYER: My objection to it  
18 is it adds undue weight to one exhibit over  
19 another. I understand if he is questioning, for  
20 example, it's the video of Mr. Dendy and there is  
21 an exhibit that is referred to that the jury,  
22 when he asks, okay, I'm going to show you exhibit  
23 whatever it is, here is the exhibit, and then the  
24 questions are there. Once the examination is  
25 done, those exhibits have to go.

1 THE COURT: Except the practical  
2 matter is he is showing it by video. So we can't  
3 show them the exhibit. So in order for them to  
4 understand what the exhibit was, as I understand  
5 what he is asking, if he can just show them, This  
6 is the exhibit that Mr. Dendy was talking about,  
7 with no other comment.

8 MR. HEENAN: Rather than stop the  
9 video and turn it off, I would prefer, I think it  
10 will be faster, if -- it's a 20-minute video --  
11 when it's done, we just show the jury what the  
12 exhibits were that he was referencing and then  
13 move on.

14 THE COURT: Any objection to  
15 that?

16 MR. SIMPSON: No, Your Honor.

17 MR. BOHYER: Withdraw the prior  
18 one on that. Thank you.

19 THE COURT: Anything else?

20 MR. HEENAN: No, Your Honor.

21 THE COURT: Just alert me when we  
22 go to read the discovery responses.

23 MR. HEENAN: It will be my first  
24 one.

25 THE COURT: And then you will

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1 call Mr. Dendy by --

2 MR. HEENAN: That's correct.

3 THE COURT: And that is all  
4 queued up and ready to go?

5 MR. HEENAN: I hope so.

6 THE COURT: Would you get the  
7 jury, please.

8 (Jury enters courtroom.)

9 THE COURT: The record will  
10 reflect counsel and the jury and the parties are  
11 all present. As I previously explained to you,  
12 the way trials proceed is that, after the opening  
13 statements, the plaintiff presents evidence that  
14 the plaintiff wishes you to consider. And we are  
15 beginning that process now.

16 Mr. Heenan has advised me that he  
17 will begin by presenting to you some discovery  
18 responses, and I will give you an instruction to  
19 help you understand that. Evidence will now be  
20 presented to you in the form of answers of one  
21 side to written interrogatories and requests for  
22 admissions submitted by the other side. These  
23 answers were given in writing and the  
24 interrogatories were answered under oath, before  
25 the actual trial, in response to questions that

1       were submitted in writing under established court  
2       procedures. You should consider the answers,  
3       insofar as possible, in the same way as if they  
4       were made from the witness stand.

5                       You may read them, Mr. Heenan.

6                       MR. HEENAN: Thank you, Your  
7       Honor.

8                       Request for admission, Please  
9       admit that Mr. McCullough never made a payment on  
10      an alleged Chase Manhattan Bank credit card  
11      account in June of 2004. Response, Defendant JRL  
12      lacks personal knowledge sufficient to either  
13      admit or deny Request For Admission Number 3 and  
14      therefore denies the same.

15                      Request for Admission Number 4,  
16      Please admit that Mr. McCullough never made a  
17      payment on an alleged Chase Manhattan Bank credit  
18      card account after 2001. Response, Defendant JRL  
19      lacks personal knowledge sufficient to either  
20      admit or deny Request For Admission Number 4 and  
21      therefore denies the same.

22                      Interrogatory Number 13, if your  
23      response to the above request for admission is  
24      anything other than an unqualified admit, please  
25      set forth in detail each and every fact upon

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1       which you base your response. Answer, Defendant  
2       JRL has no firsthand knowledge of what payments  
3       may or may not have been made by Timothy  
4       McCollough in 2001.

5                       THE COURT: All right. You may  
6       call your next witness, and I understand you're  
7       going to do this through a video deposition. Is  
8       that right?

9                       MR. HEENAN: That's correct. At  
10      this time we will call Charles Dendy by video  
11      deposition.

12                      THE COURT: Ladies and gentlemen,  
13      a deposition is sworn testimony of a witness  
14      taken before trial. The witness is placed under  
15      oath to tell the truth, and lawyers for each  
16      party may ask questions. The questions and  
17      answers are recorded both in writing by a court  
18      reporter, such as we have here, and in this case  
19      by videotape. When a person is unavailable to  
20      testify at trial, the deposition of that person  
21      may be used at trial.

22                      The deposition of Charles Dendy  
23      was taken on July 22, 2008. You should consider  
24      deposition testimony presented to you in court in  
25      lieu of live testimony, insofar as possible, in

1 the same way as if the witness had been present  
2 to testify.

3 MR. HEENAN: My apologies, Your  
4 Honor. I don't know if I might move out of order  
5 and call Mike Eakin live.

6 THE COURT: Okay. Mr. Eakin,  
7 please come forward and be sworn.

8 DENNIS MICHAEL EAKIN, having been duly sworn,  
9 was examined and testified as follows:

10 THE CLERK: Please have a seat  
11 and state your full name and spell it for the  
12 record.

13 THE WITNESS: My name is Dennis  
14 Michael Eakin. Last name is spelled E-a-k-i-n.

15 DIRECT EXAMINATION

16 BY MR. HEENAN:

17 Q. Please state your business address for the  
18 record.

19 A. Yes. 2442 1st Avenue North, Billings,  
20 Montana. That's the office of Montana Legal  
21 Services.

22 Q. What is your occupation, Mr. Eakin?

23 A. I'm an attorney.

24 Q. At Montana Legal Services?

25 A. Yes. I've been an attorney there for

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1 approximately 32, going on 33 years; about 28, 29  
2 of it here in Billings.

3 Q. How long have you been a lawyer?

4 A. Going on 33 years.

5 Q. So your entire professional career has  
6 been at Montana Legal Services?

7 A. Yes, it has.

8 Q. What courts are you admitted to?

9 A. I'm admitted to the U.S. Supreme Court,  
10 the 9th Circuit, the courts in Montana. I also  
11 practice in the Northern Cheyenne Tribal Court,  
12 Crow Tribal Court. I'm admitted to Kootenai  
13 Salish Tribal Court. In the past I have been  
14 admitted to the U.S. Tax Court and the courts of  
15 Texas. I let those memberships lapse simply  
16 because I was not practicing there and I have  
17 three kids.

18 Q. What's more nerve-racking, Mike? Sitting  
19 in that chair as a witness or standing in front of  
20 the 9th Circuit or Supreme Court?

21 A. I've been in front of Appellate Courts on  
22 a number of occasions. This is the first time  
23 I've been called as a witness. I'm much more  
24 nervous here today, doing this, than I would be in  
25 front of the 9th Circuit.

1 Q. Explain, if you will, what Montana Legal  
2 Services does.

3 A. We provide civil representation and advise  
4 clients with legal problems, all civil legal  
5 problems.

6 Q. What does 'civil' mean?

7 A. Civil is basically as opposed to criminal.  
8 It can be anything from consumer law, which is the  
9 area I practice, Indian law, another area where I  
10 practice. We also have people who do housing law,  
11 landlord-tenant law, public benefits law, trying  
12 to get people Social Security disability or other  
13 public benefits, domestic relations; just  
14 something where it's generally two-part, two  
15 individual parties going against each other as  
16 opposed to the government saying, You broke one of  
17 our laws and we want to put you in jail, which  
18 would be a criminal case.

19 Q. So Legal Services doesn't represent any  
20 criminals or defendants in criminal actions?

21 A. No defendants in criminal actions. There  
22 may be one or two that have had misfortunes and  
23 are -- we don't represent anyone currently in the  
24 prison system, but folks incarcerated when they  
25 were 20 and are now 45 or 50 and have



1 landlord-tenant problems are eligible for Legal  
2 Services.

3 Q. Who is eligible for Legal Services?

4 A. We have income guidelines that do provide  
5 actual representation in court that generally the  
6 person has to have income of less than 125 percent  
7 of the federal poverty level. We can provide --

8 Q. What does that mean in terms of a real  
9 dollar figure for someone?

10 A. Probably approximately a thousand dollars  
11 per month for an individual and approximately 600  
12 a month for each other dependent. So single  
13 person, it's going to be close to 12,000 a year;  
14 25 to 30,000 like for a family of four.

15 Q. Is it a fair characterization to say Legal  
16 Services represents the poorest people in our  
17 communities?

18 A. Yes.

19 Q. How does Legal Services get paid? By  
20 these clients?

21 A. No. Most of our funding comes from grants  
22 from the National Legal Services Corporation,  
23 which is funded by Congress.

24 Q. Are there limitations placed on Legal  
25 Services with respect to assisting poverty-level

1 people in consumer actions?

2 A. Yes, there are. We are not permitted to  
3 do any class actions, and we are not permitted to  
4 take fee-generating cases. And even if a case is  
5 not normally considered fee-generating and we  
6 provide representation and we prevail, we are not  
7 permitted to collect attorneys' fees from the  
8 other side.

9 There is an occasional exception,  
10 if there is funding for an Indian tribe, and that  
11 money is used to provide representation.

12 Q. Is Montana Legal Services well funded?

13 A. No. Recently, we have had to lay off a  
14 number of people, including approximately three  
15 attorney positions, because of decrease in  
16 funding. Besides the federal funding, which has  
17 been fairly consistent, we also receive funding  
18 from interest on lawyers' trust accounts, and  
19 interest rates have been at an all-time low, which  
20 may be good for some folks, but if you're relying  
21 on interest, it costs to cut off funding, and we  
22 have had to lay off staff.

23 Q. In light of the decrease to Legal  
24 Services, does that impact the ability of Legal  
25 Services to help consumers?

1       A.           Certainly. One of the positions that was  
2       lost was an attorney in the consumer law position.

3       Q.           Tell the jury what 'consumer law' means.

4       A.           Generally it's going to be an individual  
5       that has been dealing with a business entity in  
6       some manner. It often is credit card debt, credit  
7       card-related. It can be car-related. We run into  
8       a lot of problems with people that have problems  
9       with a car they bought.

10      Q.           Is that commonly called lemon law?

11      A.           Lemon law, yes. Also, if a person allows  
12      a car to be repossessed, very often there is a  
13      deficiency after the car is repossessed and sold,  
14      and a creditor will come after the consumer for  
15      payment on the contract even though the car has  
16      been returned or sold.

17      Q.           So tell me. At Legal Services, your niche  
18      is this area of consumer law.

19      A.           Yes.

20      Q.           And that's been over the extent of your 30  
21      plus years as a lawyer.

22      A.           Yes. I've been practicing consumer law.  
23      I came and started with The Consumer Project,  
24      which was a VISTA project back in 1976.

25      Q.           As part of your consumer law practice, do

1       you have occasion to put on continuing legal  
2       education programs?

3       A.       Yes, we do.

4       Q.       And specifically, tell the jury what a  
5       continuing legal education program is.

6       A.       It's a program where lawyers are updated  
7       about new developments or about a new area of the  
8       law or old area of the law that has new  
9       developments in that law that the State Bar here  
10      and in most states requires a certain number of  
11      hours of continuing education each year. In  
12      Montana, it's 15 hours per year that you have to  
13      be instructed in some area of law.

14      Q.       And basically, you've taught other lawyers  
15      about the area of consumer law?

16      A.       Yes, I have.

17      Q.       And specifically, have you taught other  
18      lawyers about debt-collection law?

19      A.       I did give continuing legal education  
20      presentation on debt collection, yes.

21      Q.       Through the State Bar?

22      A.       Yes.

23      Q.       Which is the entity that licenses us as  
24      Montana lawyers, right?

25      A.       Correct.

1 Q. And in that presentation that you gave --

2 MR. SIMPSON: Your Honor, I  
3 object. Mr. Eakin's presentation materials were  
4 not disclosed in his expert witness disclosure.

5 THE COURT: Overruled.

6 BY MR. HEENAN:

7 Q. In the presentation that you gave, other  
8 lawyers would attend?

9 A. Yes.

10 Q. In fact, other Montana collection lawyers  
11 would attend that program. Is that --

12 A. Yes. That is correct.

13 Q. Why would it be the collection lawyers  
14 would want to show up to hear what a Legal  
15 Services consumer lawyer has to say?

16 MR. SIMPSON: Objection. Calls  
17 for speculation.

18 THE COURT: Sustained.

19 BY MR. HEENAN:

20 Q. Let me ask you this way. Have you given  
21 just one presentation on debt collection?

22 A. No, I've given several presentations on  
23 debt collection.

24 Q. Has a Johnson Rodenburg attorney ever  
25 attended one of those presentations?

1       A.           Not to my knowledge, but I did not take  
2       role.

3       Q.           Have you, as part of your practice, had  
4       occasion to participate in putting together legal  
5       guides for people?

6       A.           I'm not sure --

7       Q.           Let me get a little more specific.

8       A.           Sure. What you mean --

9       Q.           It's my understanding that you were an  
10      editor of the National Consumer Law Center  
11      Surviving Debt book. Is that true?

12      A.           I did help edit the first edition of that  
13      book. I was not an author.

14      Q.           Thank you. What was that book, Surviving  
15      Debt?

16      A.           It was a book that intended to give  
17      laypersons a guide on what to do if they found  
18      themselves in debt and had recently lost an income  
19      for some reason, such as unemployment or  
20      disability, what sort of actions that they might  
21      be facing, what steps they could take.

22      Q.           In your practice, is it fair to say that  
23      you only represent debtors, not debt collectors?  
24      Is that true?

25      A.           That is true.

1 Q. Do you have any idea how many debtors you  
2 have assisted in your 32 years?

3 A. Not really. I would have to take a wild  
4 guess. I did look in the Legal Services program  
5 that we have been using for the last 12 years, and  
6 in that time we -- the program as a whole has  
7 advised approximately 5400 people in collection  
8 matters. We have also advised about 3500 people  
9 on bankruptcy. There may be some overlap between  
10 those two.

11 And over those 12 years, I've been  
12 supervising the consumer law unit. So that the  
13 actual number in the last 12 years, I've done, I  
14 believe, in the neighborhood of 800 collection  
15 cases. That varies from a simple phone call to  
16 arguing in the 9th Circuit. It runs a very much  
17 larger number of advice phone calls than arguing  
18 on appeal in federal court.

19 Q. Is it fair to say that you don't have  
20 enough resources to be able to jump in and defend  
21 everybody who has been sued in a debt-collection  
22 case?

23 A. That is true, yes.

24 Q. What do you do about the people that you  
25 can't jump in and defend?

1       A.           We often just give advice over the phone.  
2       Or the next step up in the level of service we  
3       deliver is drafting court documents that they can  
4       file by themselves, an answer, and tell them, "You  
5       can file this and then you're on your own."

6                   It prevents a default judgement  
7       from being taken.

8       Q.           In your experience defending and helping  
9       people who are facing debt-collection actions, is  
10      it your experience that they have the money, they  
11      just don't want to pay?

12      A.           Just the opposite. Almost all want to pay  
13      what they consider their legitimate debts and  
14      simply do not have the money to do so.

15      Q.           What do you mean, "legitimate debts"?

16      A.           That there are times when they will come  
17      in and, like a deficiency on the car case, where  
18      they owed \$10,000 on a car and if it were sold at  
19      an auction --

20                   MR. SIMPSON: I object. This is  
21      beyond the scope of Mr. Eakin's disclosure.

22                   THE COURT: Is this within the  
23      scope of the disclosure, Mr. Heenan?

24                   MR. HEENAN: I think so, Your  
25      Honor. He is just explaining right now his



1 background. I can move on, if Your Honor wants  
2 me to.

3 THE COURT: Why don't you move  
4 on.

5 MR. HEENAN: Sure.

6 BY MR. HEENAN:

7 Q. Mike, how did it come to be that you're  
8 here testifying, sitting in the hot seat?

9 A. You asked me to be here.

10 Q. Did I offer to pay you or has anyone  
11 offered to pay you for your time?

12 A. No, I'm not being paid for my time.

13 Q. Do you have any personal or financial  
14 interest in the outcome of this lawsuit?

15 A. I have no financial interest in the  
16 outcome of this lawsuit. Obviously I have a  
17 career defending consumers and I have a personal  
18 interest in this, just a general interest in  
19 consumer litigation, just like I might pick up a  
20 newspaper and read about something I'm interested  
21 in. It doesn't mean I have a personal financial  
22 stake or anything that would affect my day-to-day  
23 operations.

24 Q. Is it fair to say, over the last 28 years  
25 in Billings and 32 years in Montana Legal

1 Services, you've developed a familiarity with the  
2 debt-collection laws that are active in Montana?

3 A. Most of them, yes.

4 Q. Have you become aware of the Johnson,  
5 Rodenburg & Lauinger debt-collection law firm?

6 A. Yes, I have. It's a firm I did not see  
7 too often, or I can't remember seeing them in the  
8 nineties, but saw them, you know, starting in the  
9 early 2000s and increasingly since then.

10 Q. Increasingly from 2000 to present?

11 A. It may have reached the peak and leveled  
12 off in the last two years, three years.

13 Q. Let me have you explain to the jury what  
14 you mean by "seeing them." How do you, as a Legal  
15 Services lawyer, see Johnson Rodenburg?

16 A. See them when somebody calls up and says,  
17 "Gee, I've been served with court papers." And  
18 you start asking questions and you ask who was the  
19 lawyer representing the plaintiff, and they'll  
20 say, "Oh, it's a Mr. Charles Dendy of the Johnson  
21 Rodenburg firm from Fargo," or actually I think it  
22 would be Bismarck.

23 Q. Does your firm have the ability to -- does  
24 Legal Services have the ability to track how many  
25 times people are calling in regard to Johnson

1 Rodenburg or Mr. Dendy?

2 A. We do have that ability. We have not  
3 always used it. We have been using it much more  
4 consistently in the last two to three years,  
5 probably in the last two years, as we developed an  
6 interest in not only what debt collectors were out  
7 there but also who was representing the debt  
8 collectors.

9 Q. In the last two or three years that you  
10 have been tracking who is representing the debt  
11 collectors, how many times has Johnson Rodenburg  
12 shown up on your radar?

13 MR. SIMPSON: Objection, Your  
14 Honor, undisclosed testimony.

15 THE COURT: I don't recall that.  
16 Can you point me where it was, Mr. Heenan?

17 MR. HEENAN: Although Johnson  
18 Rodenburg has been collecting debts in Montana  
19 for some time, the --

20 THE COURT: I don't need you to  
21 read it. I need you to tell me if he disclosed  
22 the number of times in the last two to three  
23 years that Johnson Rodenburg has shown up on, as  
24 you put it, their radar screen.

25 MR. HEENAN: I don't know that he

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1 provided a specific number, Your Honor. In fact  
2 he didn't.

3 THE COURT: I sustain the  
4 objection.

5 BY MR. HEENAN:

6 Q. Without saying a specific number, what has  
7 Johnson Rodenburg done in general terms to show up  
8 on your radar screen?

9 A. They are one of the most consistent  
10 collection firms that we see in the state. That a  
11 client you're talking to on the phone or at the  
12 first interview is often surprised that you would  
13 be able to pick out a law firm in North Dakota  
14 that is representing someone, but it's from the  
15 same. And very often you're able to figure out  
16 that a certain particular collector or debt buyer  
17 pursuing actions in Montana, or particularly the  
18 eastern half of Montana, are going to be  
19 represented by Johnson Rodenburg.

20 Q. Do you have an opinion, Mike, about why it  
21 is that the number of lawsuits that you've seen  
22 out of Johnson Rodenburg has risen dramatically  
23 over the last, say, seven or eight years?

24 MR. SIMPSON: Objection.

25 Foundation.

1 THE COURT: Sustained.

2 BY MR. HEENAN:

3 Q. Are you aware that Johnson Rodenburg's  
4 filings have risen dramatically over the last  
5 seven or eight years?

6 A. From what I have seen, they have risen  
7 significantly over the last seven or eight years.

8 Q. Do you have an opinion for why that would  
9 be?

10 MR. SIMPSON: Same objection.

11 THE COURT: Sustained. You can  
12 ask him if he knows.

13 BY MR. HEENAN:

14 Q. Do you know why that would be?

15 THE COURT: The question is, do  
16 you know why that is?

17 THE WITNESS: I think I know why.

18 BY MR. HEENAN:

19 Q. Let me strike that last question and let  
20 me ask you this. Over the last seven or eight  
21 years, have you seen the amount of debt-buyer  
22 lawsuits rise in Montana?

23 A. Yes, I have.

24 Q. Has that been a slow growth, a rapid  
25 growth? How would you characterize it?

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1       A.           I would characterize it as a rapid growth.

2       Q.           What about the amount of lawsuits that  
3       Johnson Rodenburg files? Would that be slow  
4       growth, steady growth, rapid growth? How would  
5       you characterize it?

6       A.           It would be rapid growth consistent with  
7       the growth of debt-buyer lawsuits.

8       Q.           Now, as part of your practice defending  
9       people, defending consumers who are the subject of  
10      these debt-buyer lawsuits, have you gained a  
11      familiarity with the industry, the debt-buyer  
12      industry?

13      A.           I've certainly read about the debt-buyer  
14      industry and have seen -- from what I've read, see  
15      it consistent with what I see in my practice.

16      Q.           How so?

17      A.           That the debt-buyer industry is increasing  
18      and that the debt-buyer lawsuits are increasing,  
19      that debt buyers often buy debt.

20                   MR. SIMPSON: I object. Again,  
21      foundation, and this calls for hearsay as well.

22                   THE COURT: Sustained.

23                   Just ask your next question. I  
24      think it's also getting to be a narrative.

25      BY MR. HEENAN:

1 Q. As part of your practice as a lawyer, have  
2 you developed opinions, through your experience in  
3 defending these debt-buyer lawsuits, about how the  
4 debt-buyer industry runs?

5 A. Yes, I have.

6 Q. What is your opinion?

7 A. That often --

8 MR. SIMPSON: Objection.  
9 Foundation.

10 MR. HEENAN: He has been  
11 disclosed as an expert witness.

12 THE COURT: If I want argument, I  
13 will call for it.

14 MR. HEENAN: Sorry, Your Honor.

15 THE COURT: The objection is  
16 foundation?

17 MR. SIMPSON: He hasn't explained  
18 the basis for his opinion as to why the  
19 debt-buyer lawsuits --

20 THE COURT: I would ask you to  
21 lay a little bit more foundation.

22 MR. HEENAN: Sure, Your Honor.  
23 Thank you.

24 BY MR. HEENAN:

25 Q. What would be the basis for your opinion

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1 about the debt-buyer industry?

2 A. That in the practice, in defending  
3 lawsuits, you can very often see what documents  
4 are presented to prove a debt and --

5 Q. How do you see what documents are  
6 presented?

7 A. If you have time, you make discovery  
8 requests. If it's some very simple small debt  
9 action, you wait for trial and --

10 Q. What is a discovery request?

11 A. Okay. Rules of Civil Procedure that  
12 lawyers operate by allow you, before trial, to  
13 request certain documents from the other side.  
14 You can ask, send out certain questions to the  
15 other side that must be answered, and request them  
16 to admit certain things, produce documents, answer  
17 questions.

18 Q. So in the context of defending people that  
19 have been sued by debt buyers, you're able to see  
20 what documents they have in hand. Is that fair?

21 A. Yes.

22 Q. And what's been your experience in terms  
23 of what documents they have in hand?

24 A. It varies.

25 Q. How does it vary?



1       A.           There are times when they have significant  
2       documents and there are times that there are, they  
3       do not have many documents.  Although often --

4       Q.           When we say -- sorry, Mike.

5       A.           Often I don't always see an answer, lack  
6       of documents, as much as a request to dismiss  
7       without prejudice.

8       Q.           What do you mean by that?

9       A.           That the lawsuit will be voluntarily  
10      dismissed rather than go through the expense of  
11      discovery and actually coming up with the  
12      documents that have been requested.

13      Q.           So we were talking about what basis you  
14      have for the debt-buyer industry.  And one of the  
15      things you're aware of is that you request the  
16      debt buyers to provide you with documentation to  
17      support the lawsuit?  Is that fair?

18      A.           Yes.

19      Q.           And sometimes they provide you with  
20      documents?

21      A.           Yes.

22      Q.           And sometimes they dismiss the case?

23                   MR. SIMPSON:  Objection.

24      Leading.

25                   THE COURT:  Overruled.

1 THE WITNESS: That is correct.

2 BY MR. HEENAN:

3 Q. How about specifically with Johnson,  
4 Rodenburg & Lauinger? Have you had occasion to  
5 deal with the Johnson, Rodenburg & Lauinger law  
6 firm in the context of helping your clients?

7 A. Yes, I have.

8 Q. And what has been your experience with  
9 respect to what they do when you ask them for  
10 documents?

11 A. Once again, it varies. Sometimes there  
12 are documents there. Sometimes it's not so much  
13 the lack of documents as a voluntary dismissal of  
14 an action, which could also be based on just  
15 having to, you know, actually go to trial  
16 sometimes will make a case not worth pursuing.

17 Q. Why wouldn't it be worth pursuing?

18 MR. SIMPSON: Objection. Calls  
19 for speculation, Your Honor.

20 THE COURT: Sustained.

21 BY MR. HEENAN:

22 Q. Do you have any personal knowledge or  
23 basis to know why Johnson Rodenburg might dismiss  
24 a lawsuit?

25 A. That I --

1 Q. Say yes or no.

2 A. Yes.

3 Q. What is that?

4 A. Basically one of two reasons: One is the  
5 time and effort to pursue something that may not  
6 lead to a recovery. The time could be better  
7 spent on a case or cases that could lead to a  
8 recovery; that if something actually goes to  
9 trial, you have to take time to prepare. So the  
10 cost of preparing, the cost of travel, if it's in  
11 a town other than where you reside, it's money  
12 that you have to invest to obtain that judgement.

13 Q. Is it fair to say you have individuals and  
14 represented dozens of Legal Services clients that  
15 are dealing with collection actions brought  
16 against them by Johnson Rodenburg?

17 A. Dozens, yes.

18 Q. Have you ever seen a Johnson, Rodenburg &  
19 Lauinger lawyer in a Montana courtroom prior to  
20 today?

21 A. Yes.

22 Q. When?

23 A. There was a motion in the state District  
24 Court across the street about a month ago. And  
25 Mr. Dendy had asked to appear by phone, and I

1 objected on that particular case and the judge  
2 denied the motion to appear by phone. So I did  
3 finally get to meet Mr. Dendy in person.

4 Q. Prior to about a month ago, you had never  
5 seen a Johnson, Rodenburg & Lauinger lawyer?

6 A. No, I had not.

7 Q. What, in your experience, is the result of  
8 the lawsuits that Johnson Rodenburg files in  
9 Montana?

10 A. That a vast majority result in default  
11 judgements in favor of the Johnson Rodenburg  
12 client.

13 Q. What is a default judgement?

14 A. A default judgement is a judgement entered  
15 by the Court after the defendant has had time to  
16 answer and did not file an answer with the Court.

17 Q. How long does the defendant have to answer  
18 a lawsuit?

19 A. Generally 20 days after the service of the  
20 summons.

21 Q. Why is it that so many of these lawsuits  
22 that Johnson Rodenburg brings results in default  
23 judgements?

24 MR. SIMPSON: Objection.

25 Foundation, calls for speculation.

1 THE COURT: Sustained.

2 BY MR. HEENAN:

3 Q. Have you had occasion to assist people who  
4 have had default judgements taken against them by  
5 Johnson Rodenburg?

6 A. Yes, I have.

7 Q. Have you come to learn what the  
8 circumstances are of those people were in terms of  
9 how they ended up having a default judgement taken  
10 against them?

11 A. Yes.

12 Q. What are some of the circumstances that  
13 you're personally aware of, Mike?

14 MR. SIMPSON: I object. This  
15 goes into topics that we discussed in pretrial  
16 discussions with respect to other litigation.

17 THE COURT: Overruled.

18 THE WITNESS: That very often  
19 after judgement I see, and very often the clients  
20 first contact us after a judgement has been  
21 entered, and we see them when they have had money  
22 either garnished out of a paycheck or taken out  
23 of a bank account and they want to know how to  
24 deal with that situation.

25 In talking to the clients about

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1 the situation, we generally -- and asking why no  
2 defense was put up, the answer is generally,  
3 "Because I could not afford a lawyer."

4 BY MR. HEENAN:

5 Q. What can Johnson Rodenburg do once it  
6 obtains a judgement against someone?

7 A. A judgement creditor, someone who has a  
8 judgement, can garnish wages. They can garnish up  
9 to one fourth of someone's take-home pay. They  
10 can execute on bank accounts. And although  
11 Montana allows you to exempt money from a bank  
12 account that comes from an exempt source, such as  
13 75 percent of wages or Social Security benefits --

14 Q. Let's explain. What's exempt sources?

15 A. Exempt sources, Montana law says there are  
16 certain monies that generally, to meet basic  
17 necessities of life, that a judgement creditor,  
18 someone with a judgement, cannot take. Those  
19 exempt sources for income are 75 percent of wages,  
20 unemployment benefits, disability benefits. Also,  
21 there are certain properties that cannot be taken,  
22 such as a car worth less than \$2500, most  
23 household goods.

24 Q. What about Social Security benefits?

25 A. Those are exempt under both Montana and

1 federal law.

2 Q. And exempt means that you can't collect  
3 them. Is that fair?

4 A. That is fair.

5 Q. Is it an easy process for someone who has  
6 a default judgement taken against them to just  
7 say, You're not entitled to my wages because they  
8 are Social Security and they are exempt.

9 A. Very often a creditor will not go after  
10 them if they know that, have been told that and  
11 are on notice. Sometimes if they aren't on notice  
12 they will execute on a bank account. The bank  
13 does not keep track of where particular money  
14 comes from and the person's entire Social Security  
15 will be taken from the bank account.

16 Q. Is it fair to say they can sweep or take  
17 all the money out of the account and it's up to  
18 the person drawing Social Security benefits to  
19 have to get them back?

20 A. The person then has to file a request with  
21 the Court to get the money back. And the Court is  
22 supposed to hold a hearing within 10 days,  
23 although that's two weeks when you don't count  
24 weekends.

25 Q. Is that an easy process for someone to

1       come in and file the paperwork?

2       A.       When you have the forms available and can  
3       run it off on a word processor, it's fairly easy  
4       for the lawyer to do. It is not easy for a person  
5       not represented by a lawyer to do.

6       Q.       In your opinion, is Johnson Rodenburg able  
7       to convert potentially worthless debt-buyer claims  
8       into valid enforceable judgements to collect on?

9                       MR. SIMPSON: Your Honor,  
10       objection. Relevance and foundation.

11                      THE COURT: Sustained.

12       BY MR. HEENAN:

13       Q.       Do you have an opinion about whether  
14       Johnson Rodenburg is able to take claims that  
15       aren't legally viable and turn them into  
16       judgements? Yes or no?

17       A.       Yes.

18       Q.       What is that opinion?

19                      MR. SIMPSON: Your Honor --

20                      THE COURT: Wait. I sustained  
21       the objection. So you have to lay some  
22       additional foundation as to what he knows about  
23       that.

24                      MR. HEENAN: Thank you, Your  
25       Honor.



1 BY MR. HEENAN:

2 Q. Do you know anything about Johnson  
3 Rodenburg's practice of -- well, do you know  
4 anything about Johnson Rodenburg's collection  
5 activities in Montana?

6 THE COURT: He has already  
7 testified about that. You asked him about  
8 converting invalid claims into judgements.  
9 That's what you need to lay a foundation on.

10 MR. HEENAN: Thank you, Your  
11 Honor.

12 BY MR. HEENAN:

13 Q. Do you have personal experience --

14 A. As --

15 Q. -- as to whether Johnson Rodenburg  
16 prosecutes claims that aren't viable under the  
17 law?

18 A. As a lawyer, I know it is possible to  
19 obtain a judgement on a debt that otherwise would  
20 be barred by statute of limitations. In Montana,  
21 statute of limitations is an affirmative defense,  
22 so it is incumbent upon a defendant to plead that  
23 the statute of limitations has run; that if the  
24 defendant doesn't, even though the law says this  
25 debt is too old to be collected if you say it's

1 too old, that a plaintiff seeking to recover money  
2 can still file the lawsuit. And if a default  
3 judgement is obtained, they would have a judgement  
4 on a debt that was too old to collect.

5 Q. That judgement would be the same as any  
6 valid, legal, enforceable judgement?

7 A. It is a valid, legal, enforceable  
8 judgement.

9 Q. Does Johnson Rodenburg treat the people it  
10 sues differently based on whether or not they  
11 appear through counsel?

12 MR. SIMPSON: Objection.

13 Foundation, Your Honor. If Mr. Eakin doesn't  
14 represent people who don't appear through  
15 counsel, he wouldn't have adequate knowledge to  
16 know.

17 THE COURT: Sustained. I think  
18 you need to lay a little more foundation.

19 MR. HEENAN: Sure, Your Honor.

20 BY MR. HEENAN:

21 Q. Sometimes, Mike, do you make an appearance  
22 on behalf of people that Johnson Rodenburg has  
23 sued?

24 A. Yes.

25 Q. Explain to the jury. What does that mean,

1 to make an appearance?

2 A. It basically means to file notice with the  
3 court that you are going to be the lawyer for the  
4 defendant.

5 Q. So that notice is a notice that makes the  
6 Court aware that you're involved and it makes the  
7 other side, here Johnson Rodenburg, know that you  
8 are involved?

9 A. Yes, anything you file with the Court, you  
10 mail a copy to the other side. Sometimes it's a  
11 notice of appearance, particularly if actions have  
12 already been going on for a while. If it's a  
13 first appearance, answering a Complaint just by  
14 filing the answer with your name on it, in  
15 Montana, that would constitute a notice that you  
16 are appearing on behalf of the defendant.

17 Q. And sometimes do you assist people who  
18 have been sued by Johnson Rodenburg without making  
19 that notice of appearance?

20 A. We draft answers that they can file  
21 themselves so that they can represent themselves.

22 Q. And do you have occasion to continue to  
23 monitor those cases where you don't make an  
24 appearance for someone but you're helping them out  
25 behind the scenes?

1       A.           On occasion we do.

2       Q.           Based on these experiences, do you have an  
3       opinion about whether Johnson Rodenburg treats  
4       people differently when they are trying to  
5       represent themselves versus when they have a  
6       lawyer?

7       A.           I think the bigger problem is that they  
8       don't; that often they treat the pro se litigant  
9       as if the litigant, the person they are trying to  
10      collect the debt from, they proceed as if he has  
11      full legal knowledge and treat him as having to  
12      know rules of law, where very often they would,  
13      you know, treat a pro se litigant a bit different.

14                   One example is even when I send  
15      out requests for discovery, generally I put in  
16      time limits that are the time limits to answer the  
17      discovery. Sometimes I've seen Johnson  
18      Rodenburg's requests for discovery where there are  
19      no time limits stated. So even though they  
20      would -- I think most lawyers provide that  
21      information. They do not provide that information  
22      to pro se litigants.

23      Q.           When we say "pro se," we are talking about  
24      someone who is representing themselves?

25      A.           Yes.

1 MR. HEENAN: I have no further  
2 questions. Thank you for your time, Mike.

3 THE COURT: You may  
4 cross-examine.

5 MR. SIMPSON: Thank you.

6 CROSS-EXAMINATION

7 BY MR. SIMPSON:

8 Q. Mr. Eakin, my name is Fred Simpson. How  
9 are you this afternoon?

10 A. Good.

11 Q. You and I have never seen each other in a  
12 courtroom before, have we?

13 A. No, we have seen each other in a law  
14 office.

15 Q. Just because we haven't seen each other in  
16 a courtroom doesn't mean you're not in a Montana  
17 courtroom on occasion, nor does it mean that I'm  
18 not, does it?

19 A. No.

20 Q. There was some testimony about your  
21 funding at Montana Legal Services. You're funded  
22 in large part by the tax payers, aren't you?

23 A. True.

24 Q. You're not here for free today. You're  
25 being paid by the taxpayer, correct?

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1       A.           It depends if I list this as annual leave  
2       or personal leave on my time sheet.

3       Q.           Mr. Eakin, when you prepared your report  
4       in this case, your September 2, 2008 report -- do  
5       you recall that?

6       A.           Yes.

7       Q.           You didn't do a complete investigation at  
8       that time, did you?

9       A.           I think I mentioned that I had done a  
10      cursory investigation of the number of defaults.

11      Q.           And you're here in the courtroom today  
12      offering the jury your expert opinion based on  
13      your cursory investigation?

14      A.           It's based on the cursory investigation  
15      that had been done at that time. I more recently  
16      took a bit more detailed look at that.

17                   It is also based on the reading  
18      that I do in debt-collection work. It's also  
19      based on discussions with other collection lawyers  
20      that I talk to on a fairly routine basis about  
21      percentages of defaults that they take. And I  
22      think the cursory investigation was related to the  
23      percentage of defaults in collection cases.

24      Q.           The person you're here for today is Mr.  
25      McCullough, true?

1       A.           True.

2       Q.           You wrote your report. You had never met  
3       him, had you?

4       A.           No.

5       Q.           You'd never spoken to him?

6       A.           No.

7       Q.           You didn't know what he thought about this  
8       case. You hadn't done complete investigation, had  
9       you?

10      A.           At the time I wrote the report, I believe  
11      I had read his pro se answer that he had filed  
12      with the Court, so I had some idea of what he  
13      thought about the lawsuit in which he was being  
14      collected.

15      Q.           At the time you authored your report, you  
16      weren't aware of what information my client had in  
17      its file as to the statute of limitations, were  
18      you?

19      A.           No.

20      Q.           You recall some questions by Mr. Heenan  
21      about your opinion that the debt-buyer number of  
22      lawsuits has rapidly increased in the last decade  
23      or so?

24      A.           Yes.

25      Q.           That might also be because people aren't

1       paying their debts, true?

2       A.           That could be, yes.

3       Q.           There was quite a bit of discussion about  
4       what can happen when a default judgement is taken  
5       against a debtor. Do you recall that testimony?

6       A.           Yes.

7       Q.           First of all, you're aware that my client  
8       never took a default judgement against Mr.  
9       McCullough, correct?

10      A.           Yes, I know he did not take, that Johnson  
11      Rodenburg did not take a default judgement against  
12      Mr. McCullough.

13      Q.           So it never tried to garnish his wages or  
14      Social Security income. It never did anything to  
15      try to execute on any assets he might have. True?

16      A.           Not against Mr. McCullough.

17      Q.           Default judgements in general, those are  
18      allowed by the State of Montana, aren't they?

19      A.           Yes.

20      Q.           In fact, to get a default judgement, the  
21      creditor, the plaintiff, has to go to the Court  
22      and apply to the Court for the default judgement.  
23      True?

24      A.           They do not have to physically go to the  
25      Court. They have to submit sufficient paperwork



1 to get it done.

2 Q. Right. It's not like something they  
3 create at their office, sign it themselves and  
4 ship it out and, voila, there's a default  
5 judgement. You have to go to the Court either  
6 through --

7 A. It's something created in the law office  
8 and mailed to the court for the judge to sign.

9 Q. So the judge has sanctioned default  
10 judgements, correct? Judges do it?

11 A. Yes.

12 Q. You had some criticism of my client's  
13 practice on occasion of not treating pro se  
14 litigants the same as litigants who have  
15 attorneys. Is that right?

16 A. Yes, and it would be something that, you  
17 know, not the same way I treat other lawyers, but  
18 apparently the way Johnson Rodenburg would treat  
19 other lawyers, possibly, speculation, because they  
20 practice in numerous states.

21 Q. You're aware that Johnson Rodenburg has a  
22 client it's representing, true?

23 A. Yes.

24 Q. And Johnson Rodenburg's primary duty is to  
25 its client, is it not?

1       A.           It also has a duty to the Court.

2       Q.           True. But it does have a duty to  
3       represent its client zealously and to the full  
4       balance of the law, correct?

5       A.           I'm not sure I agree with the term  
6       zealously. I think in Montana the Rules of Ethics  
7       have changed and they have dropped the word  
8       'zealous representation.'

9                   They do have an obligation to  
10      represent their client diligently and try to seek  
11      legal of their client.

12      Q.           When you're at Montana Legal Services  
13      representing your client, you're putting your best  
14      effort forth to represent your client, not the  
15      other side, true?

16      A.           Within limits, yes.

17      Q.           And in fact, the Rules of Civil Procedure  
18      apply equally to the parties whether they have  
19      lawyers or not, true?

20      A.           Yes.

21                   MR. SIMPSON: No further  
22      questions.

23                   THE COURT: Is there redirect  
24      examination?

25                   MR. HEENAN: No, Your Honor.

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1 THE COURT: Thank you, Mr. Eakin.

2 You may step down.

3 MR. HEENAN: May he be excused?

4 THE COURT: Yes. Is there any  
5 objection to him being dismissed?

6 MR. SIMPSON: No, Your Honor.

7 THE COURT: Yes. He is excused.  
8 Please call your next witness.

9 MR. HEENAN: Thank you, Your  
10 Honor. We are going to try a second run at this  
11 and call Charles Dendy by video.

12 THE COURT: The jury will recall  
13 the previous instruction I gave you with respect  
14 to deposition testimony.

15 MR. HEENAN: Your Honor, I  
16 apologize. Can we have a short break, five  
17 minutes?

18 THE COURT: All right. This is  
19 why we took a longer lunch break.

20 MR. HEENAN: I know. I'm sorry,  
21 Your Honor.

22 THE COURT: We will take a short  
23 break and hope they let us know very quickly that  
24 things are ready to go.

25 We will take a short recess and

1 do remember the admonitions I had previously  
2 given you.

3 (Brief recess.)

4 THE COURT: We are again in  
5 session. I understand the video is queued and  
6 ready to go. You may proceed.

7 MR. HEENAN: Thank you, Your  
8 Honor.

9 (At which time the videotaped  
10 deposition of Charles Dendy is played for the  
11 jury.)

12 MR. HEENAN: At this time, Your  
13 Honor, I would like to publish for the jury  
14 Exhibits 14 and 15 which are already admitted  
15 into evidence.

16 THE COURT: I understand there  
17 are no objections.

18 MR. SIMPSON: No objection.

19 THE COURT: You may do so.

20 MR. HEENAN: First Exhibit 13.  
21 Bring up Subject line. Bring up the body of the  
22 e-mail.

23 THE COURT: Ladies and gentlemen  
24 of the jury, so you understand, these are the  
25 documents about which Mr. Dendy just testified in

1 his deposition. But since we were showing the  
2 video deposition, we couldn't show these  
3 documents at the same time.

4 So you may proceed. Go ahead,  
5 Mr. Heenan. I think this was read.

6 MR. HEENAN: Thank you, Your  
7 Honor.

8 Exhibit 14, please? Oh, wait.  
9 Stay on 13. Please put up the response reference  
10 by Mr. Dendy. Thank you.

11 Now Exhibit 14, please. Bring up  
12 that whole thing. And then page two, please, of  
13 the subpoena. Bring up all that. Thank you.

14 THE COURT: Okay.

15 MR. HEENAN: Plaintiff will now  
16 call Kerri Henan live, Your Honor.

17 THE COURT: Please come forward  
18 and be sworn.

19 KERRI HENAN, having been duly sworn, was  
20 examined and testified as follows:

21 THE CLERK COURT: Please have a  
22 seat, state your name and spell it for the  
23 record.

24 THE WITNESS: My name is Kerri  
25 Henan. K-e-r-r-i, H-e-n-a-n.

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1

2 DIRECT EXAMINATION

3 BY MR. HEENAN:

4 Q. Hi, Kerri. Thanks for being here today.

5 Let's dispense with the first question. You and I  
6 aren't related, right?

7 A. No.

8 Q. I have one more vowel than you do in your  
9 name, but we might share some Irish roots.

10 A. Maybe.

11 Q. Were you sued by Johnson Rodenburg?

12 A. I was.

13 Q. When?

14 A. I think last fall -- no. Was it 2007? It  
15 was last year part, yeah, 2008.

16 Q. Would it refresh your recollection if I  
17 handed you a copy of the Complaint?

18 MR. HEENAN: May I approach the  
19 witness, Your Honor?

20 THE COURT: You may.

21 THE WITNESS: Oh, it was the  
22 first of 2008, January.

23 BY MR. HEENAN:

24 Q. And on behalf of whom did Johnson  
25 Rodenburg sue you?

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1       A.           From a Portfolio Recovery Associates.

2       Q.           Had you ever heard of Portfolio Recovery  
3 Associates?

4       A.           No.

5       Q.           What is your understanding of why Johnson  
6 Rodenburg, on behalf of Portfolio Recovery  
7 Associates, sued you?

8       A.           They were behind Capital One Bank credit  
9 card balance that was due, they said.

10      Q.           So it's your understanding that Portfolio  
11 said they had the right to collect on this Capital  
12 One Bank card?

13      A.           Correct. That's the way I understood it.

14      Q.           Did you have a Capital One credit card?

15      A.           I did at one time, yes.

16      Q.           How long ago?

17      A.           It had to be when I was married, and that  
18 was -- and I've been divorced for 16 years, so it  
19 went clear back to that time.

20      Q.           So you can remember because it was when  
21 you were still married.

22      A.           Yes. Yes. And this here, I've kind of  
23 had to do some research to see when I had the  
24 Capital One card.

25      Q.           Because it was back when you were married

1 16 years ago?

2 A. Yes.

3 Q. Was that a credit card that was yours  
4 alone?

5 A. No, no. It was with both of us.

6 Q. And when you say, "both of us," you and  
7 your ex-husband?

8 A. Correct.

9 Q. Was that credit card dealt with somehow in  
10 the divorce?

11 A. It was, but, you know, I never looked to  
12 see how it was dealt with, but yeah.

13 Q. Did you choose to stop -- well, let me ask  
14 you. Did you stop paying on the Capital One Bank  
15 card sometime in the divorce process?

16 A. It was after the divorce. I just couldn't  
17 keep up with the payments.

18 Q. What do you mean you couldn't keep up with  
19 the payments?

20 A. Well, it was just one of those things  
21 where there was -- my daycare cost at that time  
22 was more than my house payment, so my child  
23 support check went strictly to pay for my -- paid  
24 for my daycare for my children. And it was just a  
25 matter of basics, just the basic everyday needs of



1       having the house payment, paying for the food,  
2       whatever, income versus expenses, you try to pay  
3       everything you can and the amount of money that I  
4       could pay towards them wasn't exactly what they  
5       were looking for.

6       Q.       Did Capital One contact you trying to  
7       collect this account?

8       A.       I'm sure they did. I don't remember that.  
9       But I'm sure they did. I can't believe they  
10      didn't.

11      Q.       Was it a long time ago?

12      A.       Yeah, long time ago.

13      Q.       When was the first time that you heard of  
14      this Portfolio Recovery?

15      A.       When I was handed, when someone came to  
16      the door and handed me a paper saying, "You've  
17      been served."

18      Q.       So that would have been the first time  
19      that you heard of Portfolio Recovery or this  
20      Johnson Rodenburg?

21      A.       Yes, yes.

22      Q.       Had you ever been sued before?

23      A.       No.

24      Q.       Describe, please, what it felt like to get  
25      sued.

1 MR. SIMPSON: Your Honor,  
2 objection, relevance.

3 THE COURT: Overruled. Briefly.

4 BY MR. HEENAN:

5 Q. You can answer.

6 A. Basically, when I got it, I remember just  
7 feeling really flushed. I mean, it was an  
8 embarrassing moment to be served, to have someone  
9 come to your door. And I think there was --  
10 between the date that this had been filed in court  
11 and the time that they served me, I think there  
12 was a two-week time. So I knew somebody had been  
13 probably around my house at that time for that  
14 couple of weeks, and that brought a lot of  
15 embarrassment to me. I was like, oh, my gosh.  
16 There has been someone around my neighborhood  
17 looking for me for that long time. It was  
18 embarrassing.

19 Q. Your children were home?

20 A. My son was at home. In fact, I think he  
21 was the one who answered the door. It was also  
22 late at night when they finally caught up with me.  
23 It was after eight o'clock.

24 Q. Is that because you were ducking them?

25 A. No, no. I work close to 80 hours a week

1       between my two jobs, so I'm not home. I'm just  
2       not home. So that's when they caught me.

3       Q.       After you had been served by this process  
4       server with this lawsuit, what did you do?

5       A.       Well, I didn't know what to do, to be  
6       honest. I was embarrassed and I didn't want to do  
7       anything. I was hoping it would somehow go away.  
8       And I talked to a couple of people and they gave  
9       me your name, so I contacted you for help.

10      Q.       And you hired me?

11      A.       I did.

12      Q.       And what happened after you hired me to  
13      represent you?

14      A.       You went through your process of the  
15      depositions and whatever, and in the end of the  
16      case, because it was past the time limit, the case  
17      was, you know, released. I don't know the exact  
18      word, but it was gone finally.

19      Q.       Gone forever.

20      A.       Yeah.

21                      MR. HEENAN: I don't have any  
22      more questions. Thank you, Your Honor.

23                      THE COURT: You may  
24      cross-examine.

25

1

2 CROSS-EXAMINATION

3 BY MR. SIMPSON:

4 Q. Ms. Henan, hello.

5 A. Hi.

6 Q. I represent Johnson, Rodenburg and

7 Lauinger. My name is Fred Simpson.

8 You don't know anything about Mr.

9 McCullough's lawsuit against Johnson, Rodenburg &

10 Lauinger, do you?

11 A. Not other than we have some similarities,

12 but other than that. . .

13 Q. How did you learn of those similarities?

14 A. I was in John's office in --

15 MR. HEENAN: Objection.

16 Attorney-client privilege.

17 THE COURT: Sustained.

18 MR. SIMPSON: Your Honor, may I

19 approach the bench?

20 THE COURT: You may.

21 You know, it's 3:30. We had a

22 brief recess earlier, but let's take our

23 afternoon recess. We will take a little shorter

24 recess than we normally do, since we had one

25 break. So we will be in recess ten minutes.

1 Please remember the admonitions I gave you  
2 earlier.

3 And I will see counsel in  
4 chambers.

5 (The following discussion took  
6 place in chambers:)

7 THE COURT: Okay. We are now in  
8 chambers with counsel present, but out of the  
9 hearing of the jury.

10 Mr. Simpson?

11 MR. SIMPSON: I think Ms. Henan's  
12 knowledge is directly relevant to her testimony  
13 here. I asked her how she came to learn of this  
14 and she was about to tell us she learned it  
15 through Mr. Heenan. This is exactly the problem  
16 that I raised in pretrial conference and in the  
17 pretrial order, that by allowing her to testify  
18 regarding the similarities of her case to Mr.  
19 McCullough she is opening the door to what he  
20 learned.

21 THE COURT: She didn't testify,  
22 as I recall, to any similarities until you asked  
23 her. You're the one who asked her about the  
24 similarities. I don't recall that Mr. Heenan  
25 did. Mr. Heenan asked her about her lawsuit and

1 her getting sued. But he didn't ask her, as I  
2 remember, anything about Mr. McCullough.

3 Is that correct, Mr. Heenan?

4 MR. HEENAN: That is correct,  
5 Your Honor.

6 THE COURT: So you opened the  
7 door to this, not him. So I'm confused about why  
8 you're objecting now, when you asked it, after  
9 complaining about it earlier and I admonished Mr.  
10 Heenan not to go there.

11 MR. SIMPSON: Well, we objected  
12 to the line of testimony in the first place,  
13 believing in the end he is going to argue, look,  
14 they were doing to her exactly what they are  
15 doing to him, and she got up and said, unknown to  
16 us, there is a statute of limitations now with  
17 her claim as well. And she is clearly being  
18 offered to show like conduct, information we  
19 didn't know about, and now I asked her what the  
20 basis of the information is. I didn't ask her  
21 what her attorney told her.

22 THE COURT: She was disclosed  
23 earlier, as I recall. Is that correct?

24 MR. HEENAN: Correct.

25 THE COURT: So she is not a

1 surprise witness. You could have taken her  
2 deposition, you could have done whatever you  
3 wanted to do. So you can't come complaining  
4 about surprise now.

5 I admonished Mr. Heenan, "Don't  
6 start asking her about Mr. McCullough's lawsuit  
7 or it's going to open the door to a lot."

8 He didn't. Now you've asked her  
9 about that and now you want to know how she  
10 knows. She knows because her attorney told her.

11 I sustained the objection. Do  
12 you have any other objections you wish to make?

13 MR. SIMPSON: No.

14 THE COURT: Is there anything  
15 further on this subject?

16 MR. HEENAN: No, Your Honor.

17 THE COURT: I do have one other  
18 thing. In preparation for the witnesses,  
19 plaintiff's expert witnesses, I again reviewed  
20 the reports. And with respect to Mr. Patten's  
21 report, a couple of things came up that I wanted  
22 to talk with counsel about.

23 He renders an opinion in the  
24 rebuttal report about the Rules of Professional  
25 Conduct. The Rules of Professional Conduct

1       themselves, in the Preamble, make clear they are  
2       not a basis for civil liability. And I don't  
3       believe, based on the Preamble and the decisions  
4       of the Montana Supreme Court, that they are a  
5       standard for civil liability or evidence of a  
6       standard of civil liability. So I would suggest  
7       that that testimony not be offered.

8                       If you wish to be heard, Mr.  
9       Heenan, I will hear you.

10                      MR. HEENAN: No, Your Honor. We  
11       will take what you're saying to heart.

12                      I would say, though, with respect  
13       to the Johnson Rodenburg lawyers, they applied  
14       for a license to practice law in the state of  
15       Montana. As part of that application process,  
16       they promised contractually to follow the Rules  
17       of Ethics. And I do think that's fair game on  
18       cross-examination.

19                      MR. BOHYER: Since I'm going to  
20       take Mr. Patten on the cross, may I respond?

21                      THE COURT: Yes.

22                      MR. BOHYER: The problem I have  
23       first and foremost I want to address, I think  
24       Rule 11 is also in the initial report too.  
25       Johnson, Rodenburg & Lauinger is --



1 THE COURT: We are not talking  
2 about the Rules of Civil Procedure.

3 MR. BOHYER: I'm sorry. I meant  
4 the Rules of Professional Conduct. Pardon me.  
5 I'm tired.

6 So it's in both of those, so I  
7 want to make sure I'm on that page. As well part  
8 of the problem here --

9 THE COURT: One moment. Will you  
10 get my book like this? I think it's on the  
11 bench.

12 MR. BOHYER: Part of the problem  
13 is that, for example, any suggestion, evidence,  
14 argument, opinion, about violations of the Rules  
15 of Civil Procedure, Rules of Professional Conduct  
16 or the like are addressed to the Court in which  
17 that case is pending.

18 With respect to a Rule 11 motion,  
19 with respect to the violation of Rule 36 for not  
20 including the warning language in there, none of  
21 those motions were addressed to the judge who  
22 could address that issue in that case.  
23 Essentially what you've got here is an end around  
24 on the judge who had jurisdiction of the original  
25 case by now asking for a tort damage on a Rule 11

1 or Rule 36 violation that is addressed by the  
2 rules, even in terms of sanctions, to the Court  
3 that has jurisdiction of that case.

4 THE COURT: We will deal with  
5 that in the examination and, if necessary, in the  
6 instructions.

7 The issue that I wanted to raise  
8 here was with respect to the Rules of  
9 Professional Conduct. And in the Preamble, it  
10 clearly says that a violation of the rules should  
11 not give rise itself to a cause of action against  
12 a lawyer, nor should it create any presumption in  
13 such a case that a legal duty has been breached.  
14 The Rules of Professional Conduct are not  
15 designed to be a basis for civil liability.

16 And so that was the purpose of  
17 it. I understand the issue you're raising with  
18 respect to the Rules of Civil Procedure. I think  
19 that is a different question than the Rules of  
20 Professional Conduct.

21 As I said, we'll deal with that  
22 as testimony is offered, and, if necessary, and I  
23 know instructions have been offered on that and  
24 we will deal with that at the time of settling  
25 the instructions as well.

1 MR. HEENAN: If I might, Andy  
2 Patten was going to testify tomorrow. I went and  
3 pulled Tom Lewis's expert trial testimony in the  
4 Seltzer case and I'm going to bring copies for  
5 counsel and the Court. I intend to follow the  
6 road map that was proved in Seltzer.

7 THE COURT: On another but  
8 related point, it appeared again, I think, from  
9 Mr. Patten's rebuttal report and I think also in  
10 his initial report, that he is going to be asked  
11 questions about the reasonableness of Mr.  
12 Heenan's fee in the underlying case.

13 MR. HEENAN: We are not going to  
14 go there, Your Honor. That is all out. I'm  
15 not -- that's, I think, an issue for the Court  
16 after. Pursuant to the --

17 THE COURT: The fees in the  
18 underlying case? I thought you were asking,  
19 according to the final pretrial order, you were  
20 asking for that as an item of damage here.

21 MR. HEENAN: True. I guess let  
22 me hear what Your Honor was going to say.

23 THE COURT: My question was  
24 whether there's a dispute about that and how far  
25 down the road we need to go. He has, in the

1       final pretrial order, indicated he is seeking  
2       \$1,520 for attorneys' fees incurred by Mr.  
3       McCullough in the lawsuit which JRL brought.

4                   And my question was, is there any  
5       dispute about that item? In terms of the amount,  
6       not perhaps the collectability of it, but in  
7       terms of the amount.

8                   MR. BOHYER: The actual dollar  
9       amount?

10                  THE COURT: Yes.

11                  MR. BOHYER: In terms of the  
12       reasonableness, yes. I think there's a dispute  
13       both with respect to the amount and the  
14       reasonableness. I would have to go back and look  
15       at the bill, and there are time entries in there,  
16       but it's not easy to go through it and parcel it  
17       out.

18                  MR. SIMPSON: I think the bill  
19       was withdrawn as an exhibit, with the time  
20       entries.

21                  MR. HEENAN: It was withdrawn.

22                  THE COURT: So we won't have an  
23       issue about that.

24                  MR. HEENAN: No, Your Honor.

25                  THE COURT: Those were the only

1 things that I had. Anything else?

2 MR. SIMPSON: There is one more  
3 issue as to Ms. Henan on her cross. I don't  
4 think I have many questions on it, but, again, I  
5 ask the Court's permission to inquire of her.  
6 She is in fact a plaintiff against Johnson  
7 Rodenburg.

8 THE COURT: Isn't she the one who  
9 just settled?

10 MR. HEENAN: No, a different one.

11 THE COURT: I think he can ask  
12 her that. Any objection to that?

13 MR. HEENAN: No, but then I'm  
14 going to stand up and say, You're the class  
15 representative of a class action of all the  
16 people that Johnson Rodenburg --

17 THE COURT: No, we are not going  
18 to go there.

19 MR. HEENAN: I think it opens a  
20 can of worms.

21 THE COURT: It does, but I think  
22 he can ask her that, to show possible bias. I  
23 don't know for what purpose you would ask her  
24 that, other than to bring up a bunch of evidence  
25 that is not relevant.

1                   MR. HEENAN: With the distinction  
2     of the difference. She is a class representative  
3     so she is not filing a lawsuit trying to recoup  
4     statute of limitations, that kind of stuff. She  
5     is prosecuting a case on behalf of a class of all  
6     the people that have been sued in the state of  
7     Montana. It would not be a fair question to say,  
8     You, Ms. Henan, have a lawsuit. She has to say,  
9     No, I on behalf of everybody in Montana that's  
10    been sued.

11                  THE COURT: Well, why don't you  
12    ask her if she is -- what do you want to get in,  
13    that she is a plaintiff's representative in a  
14    class action lawsuit?

15                  MR. HEENAN: That's fair.  
16    Because she doesn't have the same financial  
17    interest that she would.

18                  MR. SIMPSON: It hasn't been  
19    certified yet, has it?

20                  MR. HEENAN: It hasn't been  
21    certified.

22                  THE COURT: But it's been brought  
23    as a class action. Whether or not it's allowed  
24    to proceed is another question. That's why I  
25    don't think any of that is relevant here.

1 I do think that the fact that she  
2 herself is involved in a lawsuit against JRL is  
3 legitimate cross-examination. But if you wanted  
4 to reflect that she's not the plaintiff but that  
5 she is a plaintiff's representative --

6 MR. HEENAN: That's all I would  
7 ask, Your Honor.

8 MR. BOHYER: I want to get this  
9 straight. You intend to ask her if she is a  
10 plaintiff's representative?

11 THE COURT: No, my suggestion  
12 was, if you want to cross-examine on that, rather  
13 than saying, You're the plaintiff, he should  
14 technically be correct and say, You're the  
15 plaintiff's representative. Which means she is  
16 also a plaintiff.

17 MR. SIMPSON: She is a plaintiff.

18 THE COURT: She is. She does  
19 stand to benefit financially.

20 MR. HEENAN: Potentially.

21 THE COURT: Just like every other  
22 member of the class.

23 MR. SIMPSON: To cut it short,  
24 why don't I say, You've made a claim against  
25 Johnson, Rodenburg & Lauinger for violation of

1 the Fair Trade Practices Act. It's true.

2 THE COURT: Any objection to  
3 that?

4 MR. HEENAN: But then can I stand  
5 up and say, As a representative of a class of the  
6 people.

7 THE COURT: What difference does  
8 it make? Whether it's as a representative, she  
9 herself has a claim. Correct?

10 MR. HEENAN: Correct.

11 THE COURT: So how is it possibly  
12 relevant here that it's a class, that she's  
13 representative of a class?

14 MR. HEENAN: I guess it's not  
15 anything I want to fight about so I won't ask  
16 that.

17 MR. SIMPSON: I will leave it  
18 alone.

19 MR. BOHYER: I think the whole  
20 inquiry, if she blurts out, Yeah, I'm in a  
21 class --

22 THE COURT: I made my rulings.  
23 You can do what you want.

24 MR. SIMPSON: We won't make it  
25 more complicated than it has to be.



1 THE COURT: Someone has been  
2 arrested on a criminal charge and I can't wait  
3 until after the trial to see them. So I'm going  
4 to have to recess a little bit early and do an  
5 initial appearance on a criminal Complaint before  
6 five.

7 MR. BOHYER: I want to raise one  
8 issue we only learned about at lunchtime today.  
9 I believe it was this morning, Your Honor, in  
10 chambers prior to trial. Mr. Heenan had brought  
11 up that in fact Ken Lucero, who will be a  
12 witness, settled with whatever claim he had  
13 against Johnson, Rodenburg & Lauinger last week.

14 MR. HEENAN: Correct.

15 MR. BOHYER: Obviously I was  
16 concerned that Mr. Simpson and I didn't know  
17 that. I learned from our client at lunch that  
18 they were prohibited, as a condition of  
19 settlement, from advising us as their lawyer.

20 MR. HEENAN: That's not a fair  
21 characterization at all.

22 MR. BOHYER: I'm telling you, we  
23 were advised that was a condition of settlement.

24 I have a real problem with that.  
25 Confidentiality agreements in settlements are one

1        thing, but to prohibit the lawyers in a case that  
2        is going to trial from knowing about it, and our  
3        client reluctantly told us, not wanting to mess  
4        up the settlement that has already been done.

5                    I have serious concerns, Judge,  
6        with the evidence that is coming in and is going  
7        to come in through Ms. Henan and Mr. Lucero that,  
8        despite your rulings about this not being about a  
9        bunch of other cases, we have already heard about  
10       it. And I know that --

11                   THE COURT: Already heard about  
12       what?

13                   MR. BOHYER: About other cases.  
14       And while I have tried to --

15                   THE COURT: I'm not following  
16       what you mean. You mean the jury has already  
17       heard?

18                   MR. BOHYER: Yeah. And I'm  
19       concerned and I want to make sure that our record  
20       is preserved here. I understand that the Court  
21       has made its rulings, but it is quite apparent,  
22       both from the opening statement, from the  
23       testimony of Ms. Henan, from the testimony of Mr.  
24       Eakin, and I'm assuming from Mr. Lucero and Mr.  
25       Patten tomorrow, that there is going to be a

1       variety of evidence that is going to come in,  
2       indeed already has, about the practices of our  
3       client in other cases.

4                   THE COURT:   Let's be clear when  
5       we are talking about other cases.   The evidence  
6       that the plaintiff seeks to offer with respect to  
7       lawsuits that your client has brought against  
8       others I have not entirely precluded.

9                   MR. BOHYER:   True.

10                  THE COURT:   Lawsuits that those  
11       people have on their own against JRL or others,  
12       that's what I have said we are not going into.   I  
13       have allowed you, if you want, to show bias of a  
14       witness by asking about it.   It's your choice how  
15       you want to handle that.

16                  But I'm not clear, Mr. Bohyer,  
17       what you're asking for relief of the Court at  
18       this time, if any.

19                  MR. BOHYER:   I guess I am.   And  
20       that's a reconsideration of the ruling, Judge,  
21       and that's, again --

22                  THE COURT:   What ruling?

23                  MR. BOHYER:   Of any evidence of  
24       these other lawsuits by Ms. Henan, Mr. Lucero.

25                  THE COURT:   I already said they

1 are not going to testify about their lawsuits.  
2 Your client sued them. That is allowed. Is that  
3 what you're asking me to reconsider?

4 MR. BOHYER: Yes, I am. The  
5 reason I'm doing it, and, again, I ask the  
6 Court's review of that *State Farm v. Campbell*  
7 case, because it is apparent to me in that case  
8 the trial judge allowed evidence of other conduct  
9 by State Farm, in both Utah and other  
10 jurisdictions, to allow the plaintiff to prove  
11 that the defendant acted in conformity in that  
12 case.

13 THE COURT: We've already covered  
14 this ground.

15 MR. BOHYER: I want to make sure  
16 I've got my record preserved.

17 THE COURT: Anything else you  
18 want to say to preserve your record?

19 MR. BOHYER: No.

20 THE COURT: That request for  
21 relief is denied.

22 MR. HEENAN: Nothing further.

23 THE COURT: I understand the only  
24 other evidence we are going to hear on this, Mr.  
25 Heenan, is Mr. Lucero.

1 MR. HEENAN: Correct, Your Honor.

2 THE COURT: Anything else?

3 MR. SIMPSON: No.

4 MR. HEENAN: Off the record.

5 (Discussion off the record.)

6 (Brief recess.)

7 THE COURT: Court is in session.

8 That took a little longer than I  
9 thought it would. In that regard, I want to tell  
10 you, from time to time during the trial, it may  
11 become necessary for me to talk to the attorneys  
12 out of the hearing of the jury, either by having  
13 a conference here at the bench or by calling a  
14 recess. Please understand that while you are  
15 waiting, we are working. The purpose of these  
16 conferences is not to keep relevant information  
17 from you but to decide how certain evidence is to  
18 be treated under the Rules of Evidence, and to  
19 avoid confusion and error. Of course, we will do  
20 what we can to keep these conferences and the  
21 length of the conferences to a minimum.

22 I may not always grant an  
23 attorney's request for a conference. Do not  
24 consider my granting or denying a grant for a  
25 conference as any indication of my opinion of the

1 case or what your verdict should be.

2 You may continue, Mr. Simpson.

3 MR. SIMPSON: Thank you.

4 BY MR. SIMPSON:

5 Q. Other than information you may have  
6 learned in your conversations with Mr. Heenan, is  
7 it fair to say you don't know anything about Mr.  
8 McCullough's case?

9 A. That's very correct.

10 Q. It's true you had a Capital One credit  
11 card back in the 1990s?

12 A. Correct.

13 Q. And it's also true that you fell behind on  
14 the card, you fell behind in your payments?

15 A. True. Correct.

16 Q. You failed to abide by the original terms  
17 of your agreement with Capital One, true?

18 A. Correct.

19 MR. SIMPSON: I have no further  
20 questions. Thank you.

21 THE COURT: Any redirect  
22 examination?

23 MR. HEENAN: No, Your Honor. I  
24 ask that the witness be excused.

25 THE COURT: Any objection?

1 MR. SIMPSON: No, Your Honor.

2 THE COURT: Thank you, Ms. Henan.  
3 You may be excused.

4 Call your next witness.

5 MR. HEENAN: Plaintiff will call  
6 Robert Dunker by video. It's a 20-minute video.

7 THE COURT: Ladies and gentlemen,  
8 I previously advised you about testimony taken by  
9 video deposition, and this time you will see a  
10 deposition of Mr. Robert Dunker. His videotape  
11 deposition was taken on March 12, 2009.

12 In the prior deposition, would it  
13 help if we turned it up a little bit, or were you  
14 able to hear okay?

15 A JUROR: We can hear.

16 THE COURT: Okay. You may  
17 proceed.

18 MR. HEENAN: Can we turn it on so  
19 the jury can see, please.

20 (At which time the videotaped  
21 deposition of Robert Dunker is played for the  
22 jury. )

23 MR. HEENAN: At this time, Your  
24 Honor, I would like to publish for the jury  
25 Exhibit 71, which has been admitted into

1 evidence.

2 THE COURT: Any objection?

3 MR. SIMPSON: No, Your Honor.

4 THE COURT: You may do so.

5 MR. HEENAN: If you could

6 highlight the whole thing, please. And next

7 page, please, the whole thing. Thank you.

8 THE COURT: Call your next

9 witness.

10 MR. HEENAN: Grace Lauinger by

11 video deposition.

12 THE COURT: Okay.

13 MR. HEENAN: This video, my

14 understanding, is 20 minutes.

15 THE COURT: Again, ladies and

16 gentlemen, I've previously advised you with

17 respect to video deposition testimony and that

18 you're to receive it and give it the same weight,

19 to the extent you're able, as you would give it

20 if the witness were here testifying live at

21 trial.

22 Is it Grace Lauinger you said

23 you're calling?

24 MR. HEENAN: Yes, Your Honor.

25 THE COURT: Ms. Grace Lauinger's

VK LEYENDECKER, LLC

20 Medicine Crow Road

Columbus, Mt. 59019 - (406) 322-5061



1 testimony was taken by video deposition on July  
2 22, 2008.

3 You may proceed.

4 MR. HEENAN: Thank you, Your  
5 Honor.

6 (At which time the videotaped  
7 deposition of Grace Lauinger is played for the  
8 jury.)

9 MR. HEENAN: At this time I would  
10 like to publish for the jury Exhibits 7 and 10  
11 referenced in Ms. Lauinger's deposition, please.

12 THE COURT: Any objection?

13 MR. SIMPSON: No, Your Honor.

14 THE COURT: You may do so.

15 MR. HEENAN: Thank you, Your  
16 Honor.

17 Start with Exhibit 7. Pull off  
18 the top part, please. Thank you. Next page,  
19 please. Next page, please. Next page, please.  
20 Next page, please. Next page, please. Next  
21 page, please. Next page, please.

22 And then Exhibit 10, please.  
23 Pull up this bottom part, please. Thank you.  
24 And the response, please. Thank you.

25 THE COURT: Ladies and gentlemen,

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1       it is now 20 to five. I have another matter that  
2       has come up that I cannot put off until tomorrow,  
3       so I'm going to recess early because I have to  
4       conduct court in another matter briefly before  
5       five o'clock.

6                       The good news is that we are  
7       making good progress and so would it be difficult  
8       for any of you to be here at 8:30 rather than  
9       nine in the morning? Okay.

10                      Is that satisfactory with counsel  
11       and the parties as well?

12                      MR. HEENAN: Yes, Your Honor.

13                      MR. SIMPSON: Yes, Your Honor

14                      THE COURT: Let's start at 8:30  
15       tomorrow morning. So do please be here ready to  
16       go by 8:30 tomorrow morning.

17                      And, again, do remember the  
18       importance of the admonitions I gave you earlier.  
19       Don't discuss the case with anyone. Don't do any  
20       research on your own. Keep an open mind until  
21       all the evidence has been presented to you and  
22       you've discussed the case with your fellow jurors  
23       during deliberations.

24                      We will be in recess until 8:30  
25       tomorrow morning.

1 C E R T I F I C A T E O F O F F I C E R.

2

3 I, Virginia Leyendecker, a Certified Shorthand  
4 Reporter and Notary Public, do hereby certify that  
5 the foregoing is a true and accurate transcript of  
6 the testimony as taken stenographically by and before  
7 me at the date, time and location aforementioned.

8 I do further certify that I am neither a relative  
9 nor employee, nor attorney or counsel to any parties  
10 involved; that I am neither related to nor employed  
11 by any such attorney or counsel, and that I am not  
12 financially interested in the action.

13

14

15

16 /s/Virginia E. Leyendecker, CSR

17 Notary Public

18 My Commission expires May 3, 2010

19 NJ C.S.R. License No. XI-1701

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